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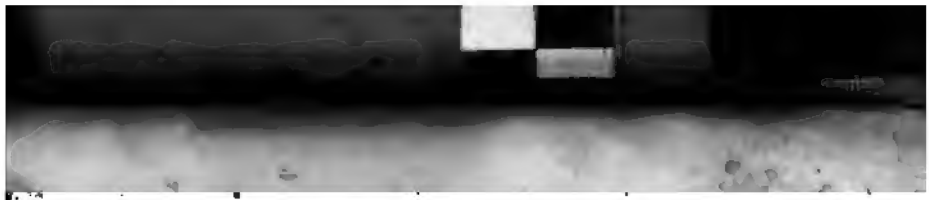

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REPORTS

OF

JUDGMENTS

DELIVERED BY

SIR ORLANDO BRIDGMAN,

WHEN CHIEF JUSTICE

OF THE

COMMON PLEAS,

FROM MICH. 1660 TO TRIN. 1667.

EDITED FROM

THE HARGRAVE MANUSCRIPTS,

BY S. BANNISTER, OF LINCOLN'S INN, ESQ.

BARRISTER AT LAW.

Eis (jurisconsultis quibusdam circa ann. 1066) *tanta præteritorum memoria eventorum, id est plane,* UT NUNC, *annalium juridicorum peritia, infuit, ut cæteri, circumquaque, facile eorum sententiam ratam fuisse, quum ederent, approbarent.*

Seldeni ad Fletam Dissertatio, p. 518.

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TO

LANCELOT SHADWELL, Esq.

AND

HENRY BELLENDEN KER, Esq.

OF LINCOLN'S INN,

THIS VOLUME

IS INSCRIBED

IN TESTIMONY OF THE EDITOR'S RESPECT.

PREFACE.

THIS Volume is printed from three of the manuscripts collected by the late Mr. Hargrave, and now deposited in the British Museum. They are Nos. 56, 57, and 58. in the Catalogue of the Hargrave Library.

The views of the very learned lawyer, *Mr. Hargrave, who contemplated printing these Reports*, together with the concurring sentiments of the most eminent early and modern authorities, upon the value of Sir Orlando Bridgman's opinions, will, the Editor trusts, justify this publication.

It is unnecessary to accumulate testimonials of the ability of this great magistrate: his name is enrolled with those of the most exalted judges; and the quaint phraseology of Carter, in praise of his peculiar excellencies, has rarely been qualified :—

" In the arguments of Chief Justice Bridgman methinks I find that *evisceratio causæ*, as the Roman orator calls it, an exact anatomy of the case, and a dextrous piercing into the very bowels of it; and it was no small commendation of an eminent professor of our law, and one that afterwards was advanced to the highest

office a person of that profession can be capable,—THAT HE ALWAYS ARGUED LIKE A LAWYER AND A GENTLEMAN (*a*)."

The authenticity of the Judgments may safely be rested upon the internal evidences which they present: but further and highly satisfactory proofs will be found in the incorrect reports (*b*) already extant, of particular cases, and in the frequent references to others by succeeding Judges. The cases in the present Volume have been examined by recent eminent authorities; Mr. Fonblanque (*c*) bears a high testimony to their "copiousness, depth, and correctness;" and Mr. Hargrave (*d*) thought that they were completed for publication by Sir Orlando himself.

His general collection of law MSS. appears to have been always well known. In p. 303. of Vol. I. of the Pleas of the Crown, Sir Matthew Hale cites a case of the 15 Car. 2. "*Ex libro Bridgman,*" and in p. 121 of the same book he speaks of having "transcribed a resolution *verbatim* out of a MS. of my Lord Keeper Bridgman, then Chief Justice of the C. B., who was present at the conference." In the report of Page *v.* Hayward, in Pigot on Recoveries, p. 197. Holt, C. J. states that he had a case of Trin. 1657, under the Lord Chief Justice Bridgman's own hand, in a *manuscript he had of his* (*e*). In Bishop Nicholson's Historical Library two treatises "on matters of law, in the hand of Sir Orlando

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(*a*) Preface to Carter's Reports.

(*b*) Pp. 2, 18, 82, 122, 153, 181, 229, 324, 373, 384, 390, 410, 475, and 484.

(*c*) Treatise of Equity, Vol. II. p. 170. n, (*a*).

(*d*) See Harg. MSS. No. 55. fol. 2. and the Preface to Lord Hale's Jurisdiction of the House of Lords, p. 139. n.

(*e*) The Chief Justice Holt seems also, in 6 Mod. 121., to cite one of the cases in the present volume, "*from a report of his own.*"

Bridgman," are mentioned p. 229; and in the same page Sir Orlando Bridgman's Manuscripts are mentioned in a specific collection, in the same terms as Sir Matthew Hale's and Mr. Selden's. Sir Orlando himself refers to his own collections; as in page 300, to *his Book of the Lord's House;* and elsewhere in this Volume to many other law papers.

The Manuscripts in the British Museum appear to be *copies* only of a portion of a *larger* collection. In the case of Thomason *v.* Mackworth, p. 523. in this Volume, there is a reference to another case as being *in the arguments of the Chief Justice,* fol. 590., whereas the case referred to is preserved by *Mr. Hargrave in No.* 55. *fol.* 65. *and No.* 57. *fol.* 164. Thus the case is extant: but no such paging as folio 590. is to be found in the Museum. The transcriber has doubtless copied the argument, without making a change of reference to his *own* book. Amongst further proofs, other marginal notes might be adduced: but as the Editor has not verified the handwriting, by comparing it with any known autograph of Sir Orlando Bridgman, he submits as a conjecture only, that the Museum Manuscripts are *not* originals. Generally they are correctly written; and the references have rarely been found to be false.

The notes of the several possessors of the books are carefully preserved and distinguished in the present Volume. Such as appear to be by Sir Orlando himself are left in the margin without marks. Mr. Umfreville (an eminent collector of law manuscripts) has bestowed much care on these. His remarks are preserved with the initials E. U. Mr. Hargrave's notes are also specially concluded with the initial letters of his name. Sometimes they may have been confused with Um-

freville's. The passages in the text, in square brackets [ ] seem to have been added to the original text by the Chief Justice himself.

In preparing this Volume for the press, the Editor has attempted rather to produce Sir Orlando Bridgman's Judgments free from incorrectness, than to add to them his own illustrations. Frequently an inaccuracy has been noticed, which may appear merely verbal, and to be attributable to the transcriber of the manuscript; it having been thought better to risk an unnecessary minuteness in this respect, than to leave to the Reader an unsatisfactory impression, that the Manuscript itself might contain something to explain an obscurity. It has not, however, appeared necessary to accumulate many notes, even of mere explanations; but where the law has been altered, the Editor has always wished to state the change. Reference has frequently been made to Digests and Treatises (as to convenient Indexes at the least) rather than that the size of the book should be increased by new collections of cases. It has not been thought necessary to notice many points on political economy, and other topics, on which the opinions expressed in this book will not, probably, be received with uniform respect.

The Editor trusts that he has not exposed himself to just reproof for making what is in some degree a new opening to voluminous collections of law papers. If the quantity is great, its accuracy will compensate that objection. The incorrectness of many of the early Reports *continues* to be a frequent subject of complaint; and it seems to be difficult to state too seriously the evils thus inflicted upon society by the scourge of a vague jurisprudence. The period of Sir Orlando Bridgman's

experience has also been considered the most important æra for the settling of the law; and it seems to possess the least accurate of our reporters, of whom Latch, Carter, Keble, and Siderfin, may be selected as examples. It would be improper in this place to collect the proofs which abound, of the truth of these remarks, which, the Editor trusts, he has not rashly permitted himself to make. The incorrect cases are sufficiently numerous to justify inquiry on the subject; by which it might appear that better evidence of the law frequently exists in manuscript than that which has already appeared in print; and when the vast interests are weighed, which, in a very few years, both in the old and new worlds, must be determined upon principles drawn from English sources, the importance of knowing the true foundations of them cannot be overrated.

Upon these grounds the Editor of this Volume ventures to hope that it may prove extensively and permanently useful.

The date of the cases may generally be ascertained. *At the restoration of Charles the Second,* Sir Orlando Bridgman was appointed Chief Baron of the Court of Exchequer, and in the following October Chief Justice of the Common Pleas. He continued in this office until the 30th of August, 1667, when he received the great seal, with the title of Lord Keeper. The judgments reported in the present Volume were delivered during that period.

This great lawyer was the son of a Bishop of Chester. His school learning was considerable; and his degrees were regularly taken at Cambridge; where, being of Queen's College, he was matriculated in July 1619, and admitted to the degree of B. A. in January 1622.

He became a member of the Inner Temple, in 1624, and was called to the bar in 1632. During many years his attendance was assiduous in the Court of King's Bench, some memorials of which are preserved in the Hargrave manuscripts. The fortieth number of that collection appears to be a part of the notes of cases taken by him; and in p. 27 of the present Volume his Lordship explains the circumstances of an authority of the 11 Car. "being present at the argument, and having taken the report of it much more largely than it is in the print."

He was member for the borough of Wigan in the long parliament—and adhering to the King in the civil war, was expelled the House of Commons in 1642. He was an active partisan in his own county; and a member of the convention at Oxford in 1643. He was also at that time Attorney of the Court of Wards to Charles the First.

At the treaty of Uxbridge in 1645, where Sir Orlando (*f*) was one of the royal commissioners, he appears to have belonged to the wise and moderate party which advised concessions to the parliament, whence the whole nation must have derived inestimable advantages. But Charles too willingly listened to other counsels; and it scarcely required the exaggerated accounts from Scotland of the successes of the perfidious Montrose to prevent a good issue of these negotiations. At this treaty he is said by Lord Clarendon to have been "one of the four Commissioners, very eminent in the know-

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(*f*) Previous to this treaty the King had knighted Mr. Bridgman; and, after some discussion, his title was recognized by the parliamentary commissioners.

ledge of the law, who, when the parliament required the power over the militia to be vested in itself, made the demand appear to be without any pretence of law or justice, and asserted it to be vested in the King by the law (*g*)."

During the commonwealth he practised as a conveyancer, and chamber counsel. Lord Holt, in citing one of his cases of the year 1657, adds,—"My Lord Chief Justice Bridgman was a very studious gentleman; and though he kept to his chambers, yet he had an account brought him of all that past in the Courts." But these habits did not withdraw him from a continual preparation to support with energy the pretensions of the exiled family whenever it was wise to act with energy. He was a commissioner in a council which was to organize the preparations for the return of Charles II.

After the Restoration Sir Orlando Bridgman received the reward of his fidelity to the Crown, and of his eminent learning in his profession; and besides being an exemplary dispenser of justice, he laboured much, but with little success, and under some imputation of timidity, in attempting to protect the Nonconformists and other Dissenters from the Church from the miserable persecutions to which they were then exposed; he was also the active patron of every good and great public enterprise.

Although devotedly attached to the Crown, he had been found too little of the bigot to approve of the principles of Charles the First; and he was too honest to sanction the unconstitutional and profligate measures

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(*g*) Lord Clarendon's History, Vol. II. p. 453.

of the sons of that unhappy King. When Lord Keeper, he refused to put the great seal upon an illegal and insidious dispensation of the penal laws; and resigned his post in 1672 rather than support, in the Court of Chancery, the consequences of the shutting of the Exchequer against the creditors of the Crown.

His Lordship died at Teddington in 1674.

Without examining critically the share which this exalted Judge took in the very important events of his time, we may safely declare in the words of Lord Chancellor Nottingham, "THAT it is due to the memory of so great a man, whenever we speak of him, to mention him with reverence, and with veneration for his learning and integrity."

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CORRECTIONS AND ADDITIONS.

Page 10. l. 31 of the marginal note for "if lease be made for years to begin *personally*," read "if lease be made for years to begin *presently*."

18. note (*a*) add "6 Mod. 121., where Payne *v.* Barker is cited by the name of Fane *v.* Barr;—and add see also 1 Salk. 243; and 7 Vin. Ab. 561. pl. 8."

75. note (*n*) it being probable that Sir George Clerk's bill upon weights and measures will pass into a law, the Editor has not thought it necessary to print the heads of it, as he had intended to do, when there appeared to be an intention in the Legislature to put off indefinitely the consideration of the subject. The Appendix, therefore, contains a very short notice of it.

92. note (*f*) for "special wording power," read "special wording *of the* power."

172. l. 9 for "than," read "that."

175. l. 2 omit "Henry."

229. note (*a*) for "Holan," read "Nolan."

239. l. 23 for "*sævitiæ*," read "*sævitia*."

251. l. 12 insert the letter H. as a reference to the case of Stone *v.* Walter in the Appendix, p. 618.

255. note (*w*) insert the letter I, as a reference to the Appendix, p. 620.

258. note (*y*) after the word "void," add—"being so found by commission; and see the case of Turner *v.* Meyers, 1 Haggard 414."

297. l. 3 for "tanquam communis abrocater, seu mediator, intromitteret" read "tanquam commu*nem* abrocator*em* *se* intromitteret."

301. note (*n*) for "means of *defence*," read "means of *obtaining justice*."

307. note (*q*) other grounds for the suggestion in this note may be found in the Bibliotheca Legum of Messrs. Clarke.

336. after the maginal note "D'Ewe's journal 482—518," add "see Appendix M."

385. l. 8 from the bottom of the page, for "should *be taken*," read "should *take*."

407. l. 18, and 408. l. 24 and 26, for "*cosin*," read "*covin*."

584. Appendix C. for (p. 50) read (p. 35.)

589. Appendix D. for (p. 70.) read (p. 60.)

632. l. 37. Appendix, after "Comb. 212." add "and see the cases of Barclay *v.* Russell, 3 Vesey 430, 432, 434; Dudley *v.* Folliott, 3 T. R. 584. and Ogden *v.* Folliott, 3 T. R. 730.

vi. Introduction, l. 28, after "*his*" add—The Chief Justice Holt seems also, in 6 Mod. 121. to cite *from a report of his own*, one of the cases in the present volume.

REPORTS

OF

JUDGMENTS

AND

JUDICIAL ARGUMENTS

DELIVERED IN THE

Court of Common Pleas,

AND IN OTHER COURTS,

From the Restoration to the year 1667.

HEMMING *v.* BRABASON.

Int. Tr. 1659. Rot. 840.

[A. and B. are lessees of land for eighty-one years, if C. so long live, the term to commence *in futuro*, and from and after the day of the death of C., for thirty-one years, from thenceforth. A. and B. enter before the commencement of the term of eighty-one years, which is a disseisin, and suspends the right of assigning the *interesse termini:* but being put out of possession by their lessor before the thirty-one years had begun, their disseisin is purged, and that future interest is not disturbed, so that their assignment of it by indenture is good.]

Eject. firmæ sr. ls. Elizabeth Riplingham, *de terris* in Eastwell, in com. Leic. Harg. MSS. No. 55. fol. 65.

Special Verdict. I. S. Sept. 13 Car. demised the premises to Stephen and Thomas Underwood, *habendum* from Michaelmas next following, for eighty-one years, if Henry Portman so long live; and from and after the day of the death of Portman for thirty-one years from thenceforth.

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Stephen and Thomas Underwood, the lessees, the same 23 September (the lease being not to begin till six days after) entered. The defendant, Sir Edward Brabason, in 1643 entered upon them, and put them out of possession: and being so out of possession, they assign all the estate by indenture to Elizabeth Riplingham the plaintiffs' lessor. The eighty-one years expire by Portman's death; and Elizabeth Riplingham demised to the plaintiff, who enters, and is ejected by the defendant.

In this case it was adjudged (*a*) that the assignment by Stephen and Thomas Underwood to Elizabeth Riplingham of the land was good.

And I delivered the reasons of the resolution of the Court, which see in my arguments at large.

BRIDGEMAN, C. J.

Harg. MSS. No. 57, fol. 164. Argument at large.

THE lands in question are of two sorts. Some of them were in lease to one Henry Portman, at the time of the lease made to Stephen and Thomas Underwood, (under which the plaintiff claims) either for his life, or for years, determinable by his death, whether the one or the other doth not appear by the verdict, nor is much material to the case. Of these there is no case before us, for it appears upon the verdict that they were leased to Stephen and Thomas Underwood for thirty-one years from the day of the death of Henry Portman, and that the lessees did not enter into these, and so no disseisin of them; and that they assigned their interest to Elizabeth Riplingham, the plaintiff's lessor, in 1646, during Portman's life; which assignment is clearly good, though off the land. And when Portman died, she, having this *interesse termini*, before entry might lease it the plaintiff; and by his entry he hath perfected the lease, and so the defendant as to so much is an ejector; and this hath been agreed on both sides.

Touching the rest of the lands in question, the case is but

(*a*) 11 Nov. Mich. Term, 13 Car. II. S. C. shortly reported in 1 Lev. 45. 1 Keb. 154. and in Skinner 538. see infra, note *h*. It is referred to in an early handwriting in the MS. report of Thomason *v*. Mackworth, No. 58. fol. 100. as being in a copy of Sir Orlando Bridgman's Arguments, fol. 591; which probably was the numbering of the report from which the copy in the Hargrave collection was taken. The case is cited in Bacon's Abridgment, tit. Leases (P); 3 Preston on Conveyancing 73; and Chambers on Leases 129. The special verdict is entered fully on the record. Further references in Mr. Hargrave's copy of 1 Lev. 45. are 2 Danvers 757. pl. 2. and 12. Sid. 8. Carthew 160. Cro. Jac. 135, 165, 258, 429, 562. Latch 199.; and 3 Mod. 198.

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this: The Earl of Meath and his son, the defendant, 23 September, 13 Car. lease the same to the Underwoods, *habendum* from Michaelmas next following for eighty-one years, if Henry Portman so long live; and after the day of the death of Portman for the term of thirty-one years from thenceforth.

The two Underwoods, the lessees, the same 23rd of September (this lease being not to begin till the 29th of September) entered.

The defendant, one of the lessors, in 1643, entered upon them, and put them out of possession.

They being thus out of possession, and off from the land, assign by indenture all to Elizabeth Riplingham, the lessor of the plaintiff.

The eighty-one years afterwards expire by Portman's death, and she leaseth to the plaintiff.

The question is, Whether this assignment made *off* the land by Stephen and Thomas Underwood to Elizabeth Riplingham, the lessor of the plaintiff, be good or not?

It is but a single point: but the resolution of it requires the consideration of several particulars; as, first, What the nature of this term for thirty-one years is: Whether it be a remainder expectant upon the term for eighty-one years if Portman so long lived, or a bare future interest without depending upon it. Secondly, When the lessees entered before the eighty-one years began, what operation that entry had; and whether the disseisin made thereby, if any be, had any influence upon this term of thirty-one years, be it either a remainder, or a future interest. And therein also, as a corollary, it will be considerable what difference there is where both these terms were limited to one and the same person; and where the first term is limited to one, and the executory term to another. In the third place, it will be considerable, when the defendant, one of the lessors, after the commencement (in point of time) of the term for eighty-one years, and before the time of the commencement of the executory or future term for thirty-one years, did enter and continue to receive the profits, what operation that hath, either to purge the disseisin, or to reduce the terms, either that for eighty-one years, which was then to have been in possession, or the other for thirty-one years, which was but future, without a re-entry of the lessees; for if the disseisin had been at first had, *in consequence of* (*b*) its

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(*b*) The words "in consequence of" have been inserted conjecturally by the Editor. Perhaps a more correct reading of the corrupt text may be: "for if the disseisin had been "at first, *and* had its operation upon "these terms, &c."

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operation upon these terms it will be requisite they be actually reduced, or else the assignment off from the land will not be good.

Before I come to these points I must say somewhat to the exceptions which have been taken.

For the first, What the nature of the term is. The case is: A lease is made to A. for eighty-one years from Michaelmas next, if B. so long live; and from and after the day of the death of B. for thirty-one years more. It is clear there is no contingency in this estate for thirty-one years; for it is certain B. must die, and the time is certainly limited for the thirty-one years. If a lease be made to me for one hundred years to commence ten years after the death of B.; this is a good lease in interest presently assignable by me without question, and not contingent. And, therefore, the case of the Earl of Derby, cited out of Hutton, in Napper and Sander's case, fol. 119., comes not home to this case. There the land was limited *to Edward, Earl of Derby, for life, and after to the use of trustees for eighty years, if Henry his son should so long live, and after his decease to Ferdinand his son, in tail.* It was said the uses in remainder vest presently, and the possibility that Henry might overlive the eighty years will not make the remainders contingent. Whether it be so, or no, I will not deliver my opinion: perhaps there may be a difference upon such limitation by way of use, and at common law; for in Holcroft's case, in Moor's Reports 486., P. 38 Eliz., a fine was levied by Holcroft to A. and B., who by the same fine rendered to him for eighty years if he so long live, and after his decease to other uses: all the subsequent uses were void (being an estate at common law) the freehold not passing out of the conusees. And, perhaps, here is a difference between a limitation of uses upon a feoffment and a covenant to stand seised to uses; and in my Report the limitation in the Earl of Derby's case was upon a covenant to stand seised.

A lease for 100 years, to commence ten years after the death of B., is good in interest, and presently assignable.

In a covenant to stand seised limitation was to a covenantor for life, and after to the use of trustees for eighty years, if B. so long live; and after his decease to C. son of the covenantor in tail. *Query* if the possibility that B. might overlive the eighty years will make the remainders contingent.

Perhaps there may be a difference on such limitation by way of use and at common law.

Perhaps a difference is between a limitation of uses on a feoffment, and a covenant to stand seised to uses.

But the ground of the doubt of those cases is because a contingent remainder cannot be limited or stand without a freehold; which reason reacheth not to our case of a term dependent upon, or limited after, another term. Then the question is, Whether this term of thirty-one years be a remainder expectant upon the eighty-one years, or a future interest. [I mean not whether it be a future interest in the first creation; for so it is without question, both being to begin at Michaelmas following, and the lease being made six days before: but whether after

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Michaelmas, when the lease for eighty-one years is to commence, this thirty-one years be a remainder upon it or no. For if I make a lease to A. for twenty-one years to begin at Michaelmas, the remainder to I. S. for twenty-one years more, there is a privity between them; and after Michaelmas it is an estate to A. in possession if he enter, remainder to I. S.; so that I say the question is, whether this term for thirty-one years shall be taken during the eighty-one years, for a remainder, or a future interest.

Lease to A. for twenty-one years to begin at Michaelmas, remainder to I. S. for twenty-one years more, there is a privity between them; and after Michaelmas, it is an estate to A. in possession if he enter, remainder to I. S.

First, consider it if the eighty-one years were in one, and the thirty (thirty-one) years in another; (*c*) and this question will go far in the case, admitting there was any divesting of the estates. If I give lands to I. S. for eighty-one years to begin presently (or at Michaelmas, for it will be all one after the term incurred) with remainder over to another for thirty-one years, this remainder depends upon the first term; so that if the first term be turned to a right, the remainder is also turned to a right; otherwise of a future interest. And therefore, if the lessee for years (with remainder over for years) having once entered, be ousted, not only the estate for years but the remainder for years is turned to a right. But if there be lessee for eighty-one years, and by another deed a lease is made to another for thirty-one years to begin after the expiration of the first lease; this being by another deed, and not depending on the first lease, it is a future interest; and the ouster of the first lessee doth not disturb nor alter the future interest, but he may grant the same before entry. [So a lease may be made by deed between A. and B. to B. for years, remainder to C. no party. But he cannot take in that deed a future interest, if no party. Vide Slingsby's case for Barkeway.] (*c*)

Land given to I. S. for eighty-one years with remainder over to B. for thirty-one years, the remainder depends on the term for eighty-one years.

Not so, if the second term be created by another deed after the term for eighty-one years.

And this difference appears in our books. "If a man make lease for years, remainder for years, the first lessee enters, a release to him in remainder for years is good to enlarge his estate." "But if a lease be made for years to begin at Michaelmas, and the lessor before the day release, this release is not good to enlarge the estate. But if there be a rent reserved, in respect of the privity, it may extinguish it." (*d*) So if a man make a lease for years to commence at a day to come, before

C. C. 270. 22 E. 4. 37 Surr. 6.

5 Co. 124. Saffin's case.

(*c*) The clauses in square brackets are in the side page of the manuscript, in the same handwriting with the text; there are many other instances of such omitted passages being supplied in a similar manner.

(*d*) Co. Litt. 46 b.

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the day the lessor is disseised, yet the lessee may grant over his interest. [If a lease be made to A. for twenty-one years, and after a second lease is made by another deed to the same A. for thirty-one years, to begin after the twenty-one, this is a future interest, (though no other shall intervene) because not made at the same time with the first, nor drawn out of the lessor's possession, but out of his reversion.]

And though both terms be granted in one deed, yet the second may be a future interest, if so limited, and not a mere remainder.

And though the first term and the future interest be both granted in one deed; yet, if upon the grant it is limited as a future interest, it will make no difference from the case where they are granted by several deeds. As if by indenture a lease be made to A. for twenty-one years, and after the expiration of thirty-one years to B. (who is made party to the indenture, as in such it is requisite not being by remainder); this to B. is a direct future interest, and doth no way depend upon the estate of A.: and though A. be ousted, this works no divesting of the estate of B.

But the second termor must be a party to the deed where a future interest is intended.

So where both terms are to one lessee, when in effect one term is granted.

The like is where both the present terms and the future or executory terms are made to one and the same party L.: if a lease for twenty-one years be made to A., and after the expiration of that term to him for thirty-one years by the same deed, it is a remainder, or rather one entire term in effect, it being a continued contract; and the ousting of the lessee extends to the whole. [As in Potkin's case, 14 H. VIII., and the Bishop of Bath's case: lease for a year, *et sic de anno in annum quamdiu partibus placuerit*, it is one lease for two years; and so, C. C. 45. a parson makes a lease for three years, and so from three years to three years so long as he shall be parson, this is a good lease for three years, and after that for three years, and for the rest uncertain. (*e*) But that is not two leases, but in effect one entire lease; for where a lease for years is made, it is in law as to the execution as a several contract for every year; and the time executory for every year and day; and, therefore, the first, or last, or middle years may be granted, and yet the rest remain to the lessee. And the reservation of several rents will not alter the case; for a man may have as many several reddendums as he pleaseth for every several year; and it is the stronger, because here it is but one *habendum*.]

The reservation of several rents does not make several terms.

Lease for twenty-one years to A., and after the

But if a lease for twenty-one years be made to A., and after the expiration of thirty-one years (that is, a further time) then to him for forty years, I take it this is a future interest not de-

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(*e*) Douglas. Rep. 551. 1 Bl. Rep. 626.; and 4 Burr. 1980., references in Mr. Hargrave's copy of 1 Lev. 45.

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pendent on the first; for there is an intervention of the estate of the lessor between; and (to this purpose) they are in him, as if they were in two several persons. If he be ousted of the term which he hath in possession, yet this divests not his future interest: he might have surrendered the one, and could not surrender the other; and he might have assigned either, and kept the other; and to this purpose (though not *in omnibus*) as I shall after shew, *quando duo jura concurrunt in unâ personâ, æque est ac in diversis.*

expiration of thirty-one years then to A. for forty years, the latter term is a future interest.

To apply this difference to our case; it comes very near a nicety. If the case here had been that the lease were made to A. for eighty-one years (either presently or from Michaelmas next) if Portman so long lived, and from and after his death for thirty-one years more, I take it this after *term* (*f*) had been either a term in remainder, or as one entire continued term; for, upon the very creation of the lease, by supposition of law eighty-one years would have been longer than Portman's life, who appears in the case to have been a man who had long before, and then was, an occupier of a great part of the lands, and had acquired to himself an estate in it; and so must be a man of some considerable age; and so tantamount as if the lease had been made for eighty-one years if Portman so long lived, and, after the expiration of that term, for thirty-one years more; for if construction shall be made, *viz.* in case of limitation of a freehold in the Earl of Derby's case, *à fortiore* in our case. And the law looks upon such a term as eighty-one years as *void* (*g*) for a mortmain, and to bring on a wardship, or respect of homage, *à fortiore* to outlast the life of Portman (*h*). The consequence whereof would be that the divesting

Hutton 119. Ante 4. The law considers that a term eighty-one years land is void for a mortmain.

(*f*) Blank in MS.

(*g*) Ibid.

(*h*) In the elaborate argument at the bar in Jerman *v.* Orchard, Skinner 537., this subject and case are thus noticed: "In many cases the law makes a difference between long and short terms; of which I might give many instances, were I not afraid I had already spent too much of your Lordship's time; as Br. Mortmain, pl. 39., a lease for four hundred years to a religious house is mortmain, for ninety-nine years is not. So in Croker and Kolsey's case, Cr. Jac. 688, 689, if a feme jointress upon the 11 H. 7. lease for twenty-one years, it is good: if for five hundred years, it is an alienation within that statute. And the like difference was taken in the Common Pleas, Mich. 13 Car. II. in the case of Hemming and Brabason, where the case was, the Earl of Meath let the lands in question to Underwood, *habendum* from Michaelmas next following for eighty-one years, if A. should so long live; and from and after the day of the death of A. to the same lessee for thirty-one years. The lessee entered before Michaelmas; and continued in possession, till after the lessor entered upon him; and he being out of possession by deed sealed off the lands, assigned his interest to the plaintiff upon whom the

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or turning to a right of the term for eighty-one years would have influence upon the remaining estate to divest and turn it to a right. But in our case the thirty-one years is not limited to begin *from the death of Portman;* but *from and after the day of the death of Portman*, and so excludes the day of his death. 5 Co. 1, Clayton's case. 2 Cr. 647, Savage and Parker's case. And whether that make any difference in the case, and makes it a future interest, is next to be considered. And as to this the point will be: a lease is made to A. for eighty-one years if Portman so long live, whether the day wherein Portman died, he dying within the years, shall be taken to belong to the lessor or to the lessee; for if it belong in construction of law to the lessee, then the term for thirty-one years beginning immediately from and after that day, there is no intervention of an estate in the lessor; and by consequence no future interest but a remainder of a term, or rather a continuation of one entire number of years as I said before. It is clear the law rejecteth all fractions of days for the incertainty; and commonly allows him that hath part of the day in law to have the whole day, unless where it by fraction or relation may be a prejudice to a third person. And therefore if, the first of May, a lease be made for a year, *habendum* from the date or making, this takes in the day of the date or making, contrary to the opinion of Clayton's case, which makes from the date and from the day of the date to be both one, and to exclude the day of the date or making. And, therefore, the lessee shall have all that day; and his lease shall end the last of April according to the resolution in Clayton's case. So the year and day, within which if a man that is struck dies, it shall be murder: though the stroke be the first of May, in the afternoon, that whole day shall be counted part, and the year shall end the last of April. In Shelly's case, he died the 9th of October, the first day of the term between five and six in the morning, and after the recovery was suffered: because he lived part of the day, though he died before the legal time of the term, that did attract the whole day to him. [Clun's case. Rent upon lease is reserved payable at Easter, the lessor dies upon that day, the rent is

Distinction in construction between the words "from the death" and "from and after the day of the death."

The law rejecteth fractions of days for the uncertainty. The whole day commonlygiven tohim that hath the fraction, unless a third person will be thereby prejudiced. 2 Cr. 647. *ubi sup.* 2 Cr. 135. Osborne and Rider's case. C. Pl. Cor. 53.

1 Co. 94.

1 Co. 127.

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defendant entered, and the plaintiff brought his action; there was a special verdict found and adjudged for the plaintiff. In this case it was objected that the term for thirty-one years was a contingent interest upon the dying of A. within the eighty-one years, for he may outlive it; but it was holden by myLord Chief Justice Bridgeman that if the lease was for thirty years, or some short time, if A. lived so long, it were merely contingent, because probably A. might outlive the term. But being for eighty-one years if A. lived so long, that made a difference; and to this all the judges agreed."

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paid unto him before his death; it shall bind the heir, though not the king. But if he die before payment, his executors shall not have it, but the heir, upon a special reason, because the payment was voluntary, and, in strictness of law, not due till the end of the day; and the last hour was the time of tender to save damages, and demand to enter for the condition broken; and so not within the reason of fraction of days.] All which enforce this conclusion, that he who hath by law part of the day, shall in computation have the rest of the day; and, therefore, the lessees here of necessity, having the first part of that day wherein Portman died as part of the "eighty-one years if he so long lived," shall have the residue also, because the law loves not partition. And then there being no intervention of any estate in the lessor between the eighty-one years, and thirty-one years, by possibility, in law they shall be taken as one estate. In Barwick's case, 5 Co. 94., the Queen made a lease to him, 28 *Julii*, for three lives, *habendum à die confectionis literarum patentium;* this excluding the day, it was resolved the letters patent were void; for if a frank-tenement should pass, it must pass at a day to come; and so the Queen have in the mean time a particular interest without donor or lessor; and this commencing of the lease the next day after the teste is all one in law as if it were to commence twenty days after.

44 E. 3. 3. Voluntary payment.

He who hath by law part of the day, shall in computation have the rest of the day.

But it hath been said against that resolution, that letters patent, *habendum à die datus*, or *confectionis*, were good enough; for the patent might be sealed, and so shall be understood, the last instant of the day; and so Rolls, Chief Justice, in Walls and Dicks, 24 Car., said it had been so adjudged. However, all of them do agree, that where there is no intervening estate between the precedent estate, and that which is limited *à die datus*, the one may support the other. And, consequently, here, both terms being granted by one and the same deed, and no intervenient estate between them, I conceive it is in law one entire estate, or at least an immediate remainder (which will have the same effect in law) that is to be turned to a right if the first term for eighty-one years be turned to a right, and to be reduced again when the other is reduced; and not before.

Resolution in Barwick's case, 5 Co. 4, questioned.

Two terms being granted by the same deed, and no intervenient estate between them, it is in law one estate; or at the least the latter is an immediate remainder.

The next consideration is, when this lease for eighty-one years (whereupon this thirty-one years is to follow) is to commence at Michaelmas, and before Michaelmas the lessees, Stephen and Thomas Underwood, enter; what influence this hath upon both these terms. It cannot be denied but that the Underwoods by their entry are disseisors. So adjudged in Clifford's case, Dyer 89, and divers other cases, where in ejectment leases made to begin at a day to come, and the time of the entry appears to be before the day, it shall be naught,

Tr. 43. El. B. R. Frank v. Douglas, C. 2. B. 176. 12 Eliz. 286.

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though it appear the ejectment to be after the lease should commence; for he still shall be accounted a disseisor. And upon that ground, and by the same authority, it is also to be held that though the term, or future interest, should commence by course of time during the disseisin, yet the estate is not divested where the disseisin is by a stranger; [yet it may be doubtful whether here it is a disseisin; for it is not found that they expelled the lessors; and 2 Cr. 684. Brookbank *versus* Taylor, a lease was 20mo. Apr. for a year, *habendum à prædicto 20mo. Apr.;* and in assumpsit for rent, he allegeth *in facto*, that *virtute dimissionis* he entered the aforesaid 20 Apr.; and it was held no disseisin, because no expulsion alleged; and the debt is due by the contract. Whereas if a disseisin, no rent was due; *no*ⁿ. *q*ᵈ. (*i*) *acco. sit det. solt.*]

In many cases a tortious fee, where there is an accession of a lawful freehold, shall be resolved and melted into it.

In many cases a tortious fee, where there shall be an accession of a lawful freehold, shall be resolved and melted into it; and in such cases the law respects a lesser estate of freehold by right than a greater by tort. But that holds not in a lease for years: a rightful term may be drowned in a tortious fee; but a tortious fee cannot be turned into a term for years, though rightful.

A rightful term *may* be drowned in a tortious fee; but a tortious fee cannot be turned into a term for years, though rightful.

Then when in our case the terms for eighty-one years, and thirty-one years, were both future at the time of the disseisin, it is the next step to consider when the eighty-one years was to begin in possession, and could not in respect of the disseisin, in what condition it then stood; whether it was turned to a right, or not; and I hold it is not turned to a right. I put the question upon the eighty-one years; for be the other term a remainder, or future interest, I am sure if the eighty-one years be not turned to a right after Michaelmas, the thirty-one years which is to follow it is not turned to a right.

To clear this point I will consider it, first, as if the entry had been by a stranger: and then, 2ndly, see what the difference is, where the entry is by the lessee himself, who ought to have had the possession. If a lease be made to A. to begin at Michaelmas, and before the day a stranger enter, the lessor is disseised; yet the future interest of A. is neither divested, nor turned to a right; and he may grant it over. So is Saffyn's case. And I think, though the disseisin continue till after

If a lease be made to begin at Michaelmas, and before the day a stranger enter, the lessor is disseised; yet the future interest of the lessee is neither divested nor turned to a right. And if the disseisin continue till after Michaelmas, that interest may be granted over.

If lease be made for years to begin personally, or at a day to come, and the lessor continue in possession beyond the time of commencement of the lease; yet the lessee may grant the same over.

(*i*) In the manuscript instead of "*q*ᵈ," which the Editor has, after some hesitation, inserted as the abbreviation for "quod," the reading is "1ᵒ" which appeared to be a mistake in the copy.

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Michaelmas, yet after Michaelmas that interest which was future, and now should commence, remains *in statu quo;* is not turned to a right, but may be granted over; for if the disseisin at first do not divest it, the continuance of that possession will make no alteration; no more than if a man make lease for years to begin presently, or at a day to come, and the lessor after continue in possession; yet the lessee may grant the same over; for the continuance of possession, where there was no precedent wrong to his estate, will not alter it.

If a lease be made to begin at Michaelmas, and before the day the lessor is disseised; and the lessor levies a fine; and then Michaelmas comes; and five years after pass; it may be collected out of Sander's case as it is put in Saffyn's case, and the difference there taken between it and Saffyn's case, that this fine bars not the lessee, who had the future interest; for it at first did not touch upon it. The truth of Sander's case was otherwise; for it was this: he who had a future interest died; the first term expired; the lessor enters, and levies a fine with proclamation before administration committed: the five years passed before administration granted; the administrator was not bound. But in the printed case of Saffyn, as it is in my Lord Coke, it seems to be the opinion in Sander's case that the fine levied during the disseisin, and before the future interest commenced in time, binds not, though future claims be not in five years after. 2 Cr. 60, 61.

But in the report of Saffyn's case, 2 Cr. 61., the opinion is, that if the fine be levied before the future interest commence, yet after it was to commence he was tied to five years, or else shall be barred by that fine levied before his interest commenced; and accordingly was the opinion of C. B. in evidence in 7 Car. C. B. between Luckton and Cowper (*j*). *Dura lex ut videtur*, and contrary to the reason of the printed case, that a fine shall not bar an estate not then turned to a right.

And agreeable is the second resolution in Podger's case, 9 Co. 106. no fine shall bar any estate in possession, reversion, or remainder not divested, nor put to a right. And in Croker and Trevithin's case (*k*), (now in print 3 Cr. 35), in my report of it, one point was: a gift was made in tail, upon condition the donee should not discontinue. He levied a fine, and five years passed; yet the Court adjudged that the donor might enter, for the title accrued by the fine; and, in judgment of law, the fine, which is the alienation, preceded; and so not

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(*j*) See Focus *v.* Salisbury, Hardres 402.

(*k*) Cruise on Fines, 1—244. ed. 1786. Cro. Eliz. 35. S. C. 1 Leon 292. and see Co. Litt. 224 a. and Butler's note to Co. Litt. 223. b. and the Touchstone 130.

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within 4 Hen. VII. c. 24. But if the condition had been broken before the fine levied, it is otherwise. [But query, of this reason; another may be given, *non admittitur ejus rei exceptio, cujus petitur dissolutio.*] But what the law is in that case is not the present question. I only urge the reason of it to what I said before, that a disseisin before the future or executory estate commenced, continuing after the commencement of it, alters not the estate; in those other cases there was both a disseisin and a fine, not a disseisin only.

The principal case of Saffyn is: a lease was made for years; then the lessor makes a second lease for years, to begin after the first; the first lessee expires; the second lessee enters not; but the reversioner (who had now no just right to enter) enters, makes a feoffment, and levies a fine; and five years pass; and adjudged it bars. For there a rule is given, where the lessor, or grantee of the future interest, may enter presently and take the profits; and so his interest is accompanied with a present entry and ability to take the profits; (*which he may transfer to another;*) it may be divested out of him, and put to a mere right not grantable.

Note hoc.

In that case, first, the lessor entered when he had no right to the possession; and so differs from the case when he makes a lease to begin presently, yet till entry the lessor, being in possession before and having no reversion, lawfully continues it; secondly, the lessor made a feoffment, and the feoffee is in of another estate. As a feoffee upon condition makes a feoffment absolute, a confirmation of his estate makes it free from the condition, though it should not the first lessees by such a confirmation; and the lessee shall vouch as of land discharged of such an interest. But a bare disseisin, before the future interest commences, makes none of these alterations. (*l*)

1 Co. 147. Anne Mayow's case.

Lease to commence at a future day, and lessor is disseised; fine by disseisor afer that day, before the future interest has come into possession and non-claim within five years, shall bar the lessee.

But I conceive it is warranted by the reason of Saffyn's case, that if a man make a lease to commence at a day to come, and is disseised; and the disseisor levy a fine after the time, the future interest shall come into a possession, that this fine and nonclaim within five years shall bar him.

In such case fine by reversioner after that day with non-claim shall bar the lessee.

So if the reversioner had, in such case, levied a fine (which is a feoffment of record) after the time that the future interest commenced, though there had been no feoffment, as was in Saffyn's case, yet the fine itself was a feoffment of record, and shall turn the future interest to a right; and, therefore,

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(*l*) See the Touchstone 24., the notes of the late edition.

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with non-claim within five years shall bar. (*m*) And so if a man make a lease for years to begin presently; and the lessee enters not, but the lessor continues the possession, and levies a fine to a stranger; the same turns it to a right, and non-claim by five years makes it a bar, according to the rule of Saffyn's cited above.

Lease for years to begin presently, and lessor continues in possession, fine by lessor with non-claim shall bar the lessee.

But a bare disseisin, before the future interest commenced, without some alteration after, turns not the same to a right; for by the same reason, that it did not at first divest that future interest, but that it is grantable over, by the same reason the continuance of that disseisin, without something after done to have a new influence upon the estate, shall not touch or work upon that future interest when it is in point of time to commence in possession; and no such new act appears in our case. Then if the disseisin (before the day that the future interest should commence) committed by a stranger, nor the continuance of that disseisin after the day, shall not turn it to a right, nor divest it; but that he may grant it over; our next inquiry must be, when this disseisin is committed by the party himself that is to have the future interest, and this disseisin continues till after the future interest should commence in point of time, as it happens in our case, how far that will alter the case. And I conceive this disseisin by him that hath the future interest doth hinder him, so long as that disseisin continues, both before and after the future interest should commence in point of time, to grant over his term; and therein it differs from the case of a disseisin by a stranger; and the reason is, they are *asystata*—he cannot have a fee and a term together—he cannot qualify his own wrong, and have a particular estate or interest by will, and a fee by wrong; and keep the wrongful and divest himself of the rightful estate by grant or assignment.

A bare disseisin, before a future interest commenced, turns not the same to a right without some alteration after.

Disseisin by one who hath a future term of years in the land hinders him to grant over his term.

But yet I conceive this disseisin, committed by him that had the future interest before the future interest commenced, doth not, either before or after the commencement thereof, turn it to a right. I do not deny that he may do an act to destroy or extinguish his own estate: but he cannot do an act to himself to turn it to a right; for it is against the nature of a right. A right remediless is in law no right; and no remitter lies upon it. If I have a right, I have a remedy for that right by entry, or action; I can bring no action against myself in this

3 Co. 3. Marquis de Winchester's case.

A right remediless is in law no right; and no remitter lies upon it.

(*m*) P. 40. C. B. Isebam and Morris' case, Cro. 110. The fifth resolution warrants this last thing. Original note in the manuscript.

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case. If I must have a right against myself, I must bring my action against myself.

If disseisor would waive his possession, the disseisee may waive it, because he may recover his costs and damages.

Secondly; nor can I enter upon myself: I cannot qualify my wrong. And if after a disseisin I would waive my possession, the disseisee may refuse it, because he may recover his costs and damages in an assize. And in (*n*) Sander's case, when the person who hath an interest in the land enters upon it when he hath no right of entry, the law construes it a suspension of his interest, not turning it to a right; and if he make a feoffment, or other act whereby his interest so suspended can be recontinued, he destroys and extinguishes such interest; but it is in none of the cases turned to a right. And, therefore, it is clear if he that hath a rent out of law, or a seignory, if he disseise the terre-tenant, his seignory or rent is suspended; he cannot grant this rent, or seignory, because he is (though wrongfully) seised of the land itself; and his rent, or seignory, is suspended during the time, but not turned to a right; for *ipso facto* that the disseisin is taken away, he is restored to his seignory, or rent, or common. Nay more, the rent in such case which should incur during the disseisin is recoverable in damages. The like law is of a common in gross for beasts certain, or profit. So here, this future interest remains a suspended interest during the disseisin committed by him who had that interest; but that disseisin being purged, it is restored to him again in the same state it was at the time of the disseisin committed.

Where one having an interest in the land, but no right of entry, does enter, the law construes this a suspension of his interest. Com. 429. Bracebridge's case. Ceo que e suspendue ne in esse per le temps. 5 Co. 31. Coulter's case, and the books there cited.

If he that hath rent out of land or a seignory disseise the terre-tenant, his seignory or rent is suspended, but not turned to a right. As soon as the disseisin is taken away, he is restored to the rent, &c.

The rent in such case to incur during the disseisin is recoverable in damages.

Where a lessee of a term, to commence at a future day, disseises the lessor, the term shall not be emerged: otherwise if a disseisor levy a fine, or make a feoffment of the premises. Hobart 334.

It hath been insisted on at the bar that the fee simple, though *tortious* (*o*), hath drowned this term; and some case put to prove it. But I think it is very clear that the disseisin alone, by him that had the future interest, doth not extinguish the term no more than in the cases of a seignory, rent, or common, which I before put. It is true if such disseisor will make a feoffment, or levy a fine, the fee carries with it, by way of extinguishment, the *lesser* (*p*) estate, to which he had but a right. In a stronger case, the principal case of the Lord Sheffield; he that hath a bare right to an entail, and a *defeasible* (*q*) possession, by treason forfeits both.

(*n*) This point not in 2 Leon. 157., in 5 Rep. 124, 5., in Carter 82., in Cro. Jac. 61., in Goldbs. 171, 2., nor in Raym. 149. The doctrine is probably cited from a manuscript report.

(*o*) Blank in MS.

(*p*) "Lessors" in MS.

(*q*) In the manuscript, "discissible:" but see the argument of the Attorney-General in Hobart 334.

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Bracebridge's case was:—He leased to Griffith a manor for years, to commence at Michaelmas next. Griffith assigns this term to Joyce, the wife of Bracebridge. The husband makes a feoffment before Michaelmas, his wife surviving after Michaelmas, this future term is extinct.

But in our case there is no act found done by the two Underwoods, the lessees, but barely the disseisin; which, as I said before, extinguisheth not the estate, but suspends it from rising during the time. And the case put by my brother Archer is upon another ground. "Lessee for years is ousted, and the reversioner disseised; the lessee releaseth to the disseisor; the term is extinct, though the disseisee re-enter." Here the term, as to the lessee, was lawfully, and by a lawful act, transferred, which was not in our case; and it was extinct only because of the incompatibility of it to stand with his greater estate; and the case put by him out of Partridge's case (*r*) by Montagu is speaking of *construction*. (*s*) If one hath a right or title to lands, and after he comes to the possession of these lands his right or title is extinct or suspended in the land; because for the time that he hath the land, it is not *in esse*, and therefore for that time it cannot be termed a right or title; I agree it to be law; his right is extinguished, *not* (*t*) suspended. But here it is but suspended only.

C. C. 275. b. 276. a.

So that as to this point I conclude, that by the disseisin committed by the lessees, the Underwoods, before their future interest commenced, not the lease for eighty-one years, much less the lease for thirty-one years, was turned to a right. And yet I conceive, for the reasons before, neither the one nor the other was grantable over.

The next thing therefore considerable is, where the defendant, Sir Edward Brabason, one of the lessors after the commencement in point of time of the eighty-one years, and before the commencement of the executory or future term (call it so if you please) of thirty-one years did re-enter, and continued that re-entry receiving all the profits, what operation that had to purge the disseisin, or reduce the terms, or make them to be assignable by the Underwoods, of the land, without entry or claim made upon the land.

And I conceive it clear they might be assigned, admitting, as I have held, they were never turned to a right. Nay, *dato, sed non concesso*, that they had been turned to a right; yet now by this re-entry of Sir Edward Brabason, it is reduced, that both the one and the other might be assigned without a re-

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(*r*) Plowden 87, query.

(*s*) A blank in the MS.

(*t*) "Or" in the manuscript.

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entry, our question is only of the thirty-one years; but I hold the same (though the contrary was admitted at the bar) of the eighty-one years, to which there was a right of present possession, that after the entry of Sir Edward Brabason, though he continued the possession, and received the profits, yet both the eighty-one years and thirty-one years were assignable without a re-entry. For, first, it is to be taken upon this verdict, that both Sir Edward and his father, the joint lessors, were seised of a joint estate in fee; no particular interests in them to the contrary appearing. Secondly, that the lessors being disseised, though they had not right to the perception of the profits if there had been no disseisin in the case, yet they may lawfully enter to purge the disseisin. In Podger's case, 9 Co. 106., and by the authorities therein cited, where a lease for years is made and the lessee ousted, and the reversioner disseised, the lessor, though he had no right to the possession, may enter in the *name of the lessee*, but *in his own right*, to save his own interest and the lessees. *A fortiore*, where he that had but the future interest, disseiseth the lessors, they may enter to recontinue their right, although the time were incurred before entry wherein the future term should commence; for other remedy they have not to purge the disseisin; for, as I said before, the lessees, the Underwoods, they cannot waive their estate gained by disseisin. And if a stranger should disseise them, this would not revest their estates; for the second disseisor, *quodam modo*, comes under the former disseisor, and shall be liable to his charges so long as the disseisins are in force. And this clear. And as both the lessees may enter to that purpose, so may one of them: for the law will construe it as the entry of both; and either of them, being *seised per tout* (*u*), has by law a power to do it.

A lessor disseised, who had no right to the perception of profits if no disseisin had been, yet may enter to purge the disseisin.

A fortiore, where he that had but the future interest disseiseth lessors, they may enter to recontinue their right although the term for the commencement of the future term were incurred.

If a stranger disseise such disseisor, this would not revest the estate.

A disseisor upon a disseisor shall be liable to his charges as long as the disseisin is in force.

It may possibly be objected that Sir Edward Brabason by his receiving the profits shews his intent; and admitting he might enter to purge the disseisin, yet having no right to the profits, he is a wrong-doer by receiving them; and so it is turned to a right. As if the lessor enter upon the lessee for years, it is turned to a right. In Sir William Elwys' case it is said of possessory things, an expulsion may be made where there is no disseisin; and, therefore, if the lessor put out the termor, there is no disseisin committed; yet the lessee hath lost his estate, and hath but a right to it. The principal case there is: a man hath a grant of three avoidances of an advowson; the grantor usurps upon the first avoidance; it is adjudged that the grantor hath thereby gotten all that he

Hobart 322 b.

(*u*) A Blank in the MS.

granted out; and the grantee cannot present all the next term. But my Lord Coke is of a contrary opinion: and cites it so adjudged, Hil. 18 Eliz. c. 13. that the grantee shall present at the next avoidance; for having the fee rightfully, he cannot make an usurpation to gain an estate. As also, in respect of the privity, he shall not put the grantee out of possession for the two later avoidances. And 12 Car. C. B. (*r*) Sir Anthony Archer's case, it was adjudged that where the reversioner had usurped upon the lessee for years of an advowson, it did not take away the term; and Hutton said that Elwys his case, upon a writ of error, was compounded.

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Be the law as it will as to the point of usurpation, yet it is clear the entry of the lessor upon the lessee of a term turns it to a right; though it, or a descent upon it, takes not away the entry.

But in our principal case, when the lessor entered to purge the disseisin, he did nothing but what was lawful, and so differs from the cases where the lessor expulseth him; and so he could not turn the eighty-one years or thirty-one years to a right. Secondly, the lessees never had a possession lawful, or by virtue of the terms, as in the cases before put; nor could not whilst that estate gained by disseisin continued; and, therefore, that which they had not could not be divested in them. Thirdly, the entry of the lessor did only remove an impediment, and could have no other influence upon the terms; and *remoto impedimento*, the case then was as if there had been no disseisin, and is this:—that a term is granted to commence at a day to come; the lessee enters not after the day, but the lessor continues in possession; yet the lessee may grant or assign his term; and there needs not either entry or claim to continue it more than in that other case. Or where a lease is made to begin presently, though the lessor continue possession; yet the grantee may grant it over as in case the lord disseise his tenant, or the grantee of a rent. The terre-tenant, *impedimento remoto*, the disseisee being removed by the entry of the terre-tenant, the seignory or rent is revived without any claim. And so here both the terms for eighty-one years and thirty-one years are revived.

So then, first, I conceive that by the entry of the lessees before the day, both the eighty-one years and thirty-one years became to be unassignable; but not turned to a right, though

(*r*) Mentioned in Mr. Butler's note to Co. Litt. 249 a. n. 189. from Lord Nottingham's MSS., as Legge *v.* Archer. See also 17 Vin. 401, S. C., Legge *v.* Sir Anthony Ager, where it is said the Court "denied the case of Sir William Ellwayes and Tailour to be law." See also Legge *v.* Archer in the Lansdowne MSS. in the British Museum, No. 1082. fol. 33.

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the lessors were disseised. And next, that by the entry of Sir Edward Brabason, one of the lessors, the disseisin was purged; and consequently the interests of the lessees, who were the disseisors, are reduced to what they should have been if there had been no disseisin; that is, to be interests assignable before entry; but not to be interests in possession till entry, to bring an action of trespass. And that the case is no more than if a lease be made to commence at a day to come, the lessors continue in possession, and receive the profits for three or four years; yet the lessees may assign from the ground, though they cannot bring an action of trespass before entry.

And so the assignment to Elizabeth Riplingham here, off from the ground, before entry, is good; and she may also lease before entry to the plaintiff; and the action upon the ejectment is by him well brought; and as to this conclusion all my brethren agree with me, whatsoever variance may be in opinion touching some of the reasons thereof by me given. (*s*)

(*s*) "I believe it is understood that though, when the judges are unanimous, the Chief Justice delivers the opinion of the Court, yet the other Justices are not presumed to adopt and concur with every doctrine that falls from him, in the course of that opinion,"—Douglas on Elections, Introd. p. 39. Ed. 1775.

PAYNE *v.* BARKER. (*a*)

Adjudged 4° Junii, 14° Caroli, Int. Hill. 1659. Rot. 773.

[Where the custom of a manor, found in a special verdict, is, "that all customary lands have at all times descended, and ought to descend to the youngest son, youngest brother, or youngest nephew, as the case may be;" and a purchaser in fee simple of a tenement held of this manor died after the surrender by the vendor, but before admittance, leaving a youngest brother, and issue of an eldest brother, the youngest son of that youngest brother shall not inherit the land. A court roll being found by the jury, *in hæc verba*, in a special verdict, a recital in that court roll is not part of the finding of the jury.]

(*a*) "Judgment was given for the defendant." Hargr. MSS. No. 55. fol. 129. S. C. cited 2 Keb. 158. "Pain *v.* Herbert in C. B., a special custom found, copyhold to descend to the youngest son, brother, or nephew; and the question there was, whether the heir of a surrenderee who died before admittance were within the custom; and adjudged he was not; for strictly a surrenderee before admittance hath but a right, and so not within the words that all copyhold lands should descend." And in 5 Burr. 2784. and see note (*p*), p. 32., for Lord Raymond's note of this case, whose reference to the roll is incorrect.

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PAYNE *v.* BARKER. Harg. MSS. No. 55, fol. 129. No. 57, fol. 140.

BRIDGMAN, C. J.

AN action of trespass and ejectment is brought by Samuel Payne, upon a lease of Robert Richer, against John Barker of a messuage, ten acres of land, and one acre of meadow, with the appurtenances, in Langham. Upon not guilty pleaded, the jury find,

That the lands in the declaration are, and time out of mind were customary lands held of the manor of Langham; and are, and for the time aforesaid were demised and demiseable by copy of Court Roll of the said manor; and that, 21st July, 1645, Thomas Went was seized thereof, in his demesne as of fee, at the will of the lord of the manor aforesaid; and the said 21st July, he and his wife came before John Dannett, then steward of the manor; and according to the custom of the manor for all the time aforesaid used, did surrender into the hands of the lord by the hands of the steward there the tenements aforesaid, to the use of Nathaniel Richer, his heirs and assigns, as by the copy of the court roll appeareth.

T. W. was seized of customary lands of the manor of L. demiseable by copy of court roll; and 21 July, 1645, he and his wife surrendered by the hand of the steward, the same to the use of N. R., his heirs and assigns; a stranger to the lands, and a purchaser.

Tenor cujus quidem copiæ sequitur in his verbis sequentibus, viz.

Ad cur: vis: franc. plegii cum cur: Baronis ibid: tent. die Jov: 6° Ap: 24° Car. coram Joh: Dannett seneschallo ibid: sic irrotulatur: viz. Ad hanc cur: compertum est per homagium, et certificat: est per Joh: Dannett seneschallum manerii præd:, quod post ult: general: cur: et ante hanc cur: scil: 21 *Jul:* 1645, Thomas Went and his wife came before the said steward, and surrendered the premises into the hands of the lord by the hands of the steward, to the use of Nathaniel Richer, his heirs and assigns in fee. *Et ulterius compertum est per homagium*, (note, this is not the finding of the jury, but part of the inrolment,) That the said Nathaniel Richer died before this court, and before his admission to the premises; and now at this court came Mary, Elizabeth, and Rose Richer in person, and Anne Walter, and Susan Richer, by John Barker, their deputy, and, as cousins and heirs of Nathaniel Richer, *viz.* daughters and heirs of Robert Richer, elder brother of the said Nathaniel, did pray to be admitted to the premises; to whom the lord, by his steward aforesaid, *concessit inde præmissa, habendum* to them and their heirs in coparcenary, to hold of the lord by the rod, *ad voluntat: domini se-*

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cundum consuetudinem manerii præd: per reddit: et servit: inde debit:, et de jure consuet: et dand: domino de fine, et sunt admissæ inde tenentes domini. Extr: per Joh: Dannett seneschallum ibid.

N. R. died 10th of Dec. 22 Car. before his admittance, S. P. leaving five nieces, daughters of his elder brother, and leaving J. R. a younger brother,

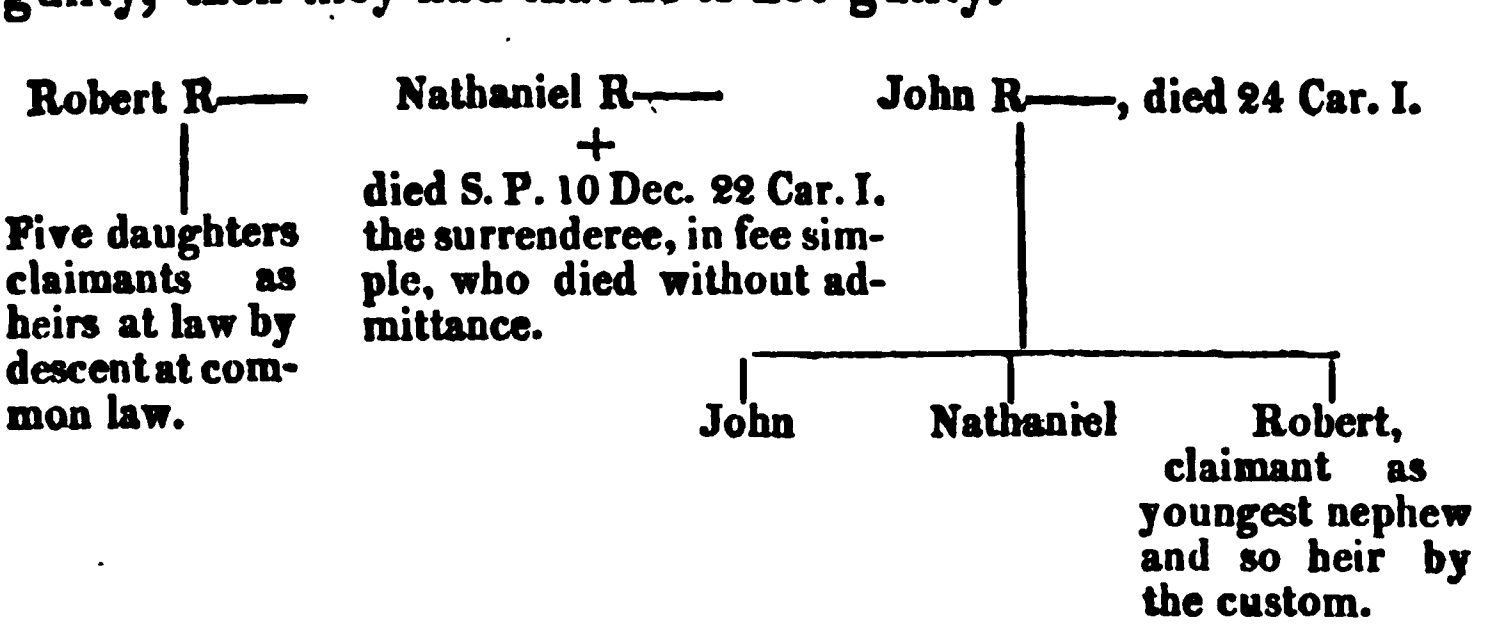
And the jury, in this special verdict, accordingly found the death of Nathaniel Richer 10 Dec. 22° Car., before his admittance without issue; and that Robert Richer was his eldest brother, and had issue the said women his heirs; and that John Richer was his younger brother, and had issue John, Nathaniel, and Robert his younger son; and that John Richer, the brother of Nathaniel, the surrenderee, 30° Martii, 24° Car. died, and his three sons survived him.

J. R. died 30th March, 24° Car. leaving issue three sons.

A custom of the manor was, that all lands should *descend* to the youngest son, brother, or nephew, as the case might be.

The youngest son of J. R. was admitted, and the daughters of the eldest brother claimed the land as heirs at common law.

They find, that within the said manor there is a custom temp&c. that all customary lands *descenderunt, et descendere debent filio natu minimo, fratri natu minimo, aut nepoti natu minimo prout casus accidit;* and that, at the Court 6° Ap. 24° Car., the said Robert, the youngest son of John, was admitted tenant of the premises in fee, according to the custom of the manor, *prout* by the copy given in evidence by the Jury, *plenius liquet;* the tenor whereof is found *in hæc verba;* and that the said Robert, 4° Oct. 1659, did enter into the premises, and was thereof seised *prout lex postulat*, and being so seised made the lease *pro ut* in the declaration; and that the defendant, by the command of the said Susan, Elizabeth, and Rose, did enter and eject him. And if the Court upon the whole matter shall think the defendant guilty, then they find that he is guilty, &c.; and if the Court shall think that he is not guilty, then they find that he is not guilty.



Myself and two of my brethren, that is, Justice Hyde and Justice Brown, do agree, that as this case is, judgment ought to be given for the defendant: but there is some difference amongst us touching our reasons. My brother Tyrrell is of another opinion. I shall briefly give the reasons of those

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things wherein we all concur; and if I have occasion to speak my single opinion on any thing, I shall accordingly deliver it as my single opinion, and not *authoritative*.

As to the matter in law upon this verdict, the case in effect is this:—A copyholder of lands, which by the custom of the manor go to the youngest, as well in the collateral as in the direct line, surrenders into the hands of the steward of the manor, to the use of Nathaniel Richer, who before presentment of this surrender dies; and the question is, whether all the daughters of his eldest brother, or the youngest son of his youngest brother, that is, whether the person who is heir at common law, or the person, who would have been heir by the custom in case Nathaniel the surrenderee had been admitted, shall inherit.

Before we can come to a resolution on this case, there are two main things considerable: first, the condition of the copyhold estate after a surrender, and before admittance: secondly, the nature of this custom, which is here found, concerning the descent of the copyhold to the youngest son, brother, or nephew, how far it hath influence upon this copyhold, to which the surrenderee was not admitted. Both these inquiries are necessary in this case.

First, we will consider a copyhold estate; how far it stands after a surrender, and before admittance: and that hath a threefold respect, as to the lord, as to the surrenderor, and as to the surrenderee.

First, I take it for law, that after a surrender till a presentment, nothing vests in the surrenderee; the surrenderor is still tenant to the lord, and shall bring an action of trespass not only against a stranger, but even against the surrenderee, if he enter; and if the surrenderor die, his heir is in by descent, and before admittance shall bring an action of trespass; for that is the difference between an heir of a copyholder who was once a copyholder, he hath an estate by descent before admittance; but a purchaser, or his heir, who never was actual tenant till admittance, hath no estate. In the argument of Burgoyne and Spurling's case, (which is now in print, in 8 Car. B. R. 1 Cro. 273. 283.) Richardson, Chief Justice, put a case, which he said was Tolmach and Holt's case. A copy-

After a surrender till a presentment nothing vests in the surrenderee. The surrenderor is still tenant to the lord, and shall bring an action of trespass against the surrenderee if he enter.

3 Calth. MS. 829 H. (*b*)

(*b*) This marginal note appears to be in Mr. Hargrave's handwriting; and the case is mentioned in the Index to Calthorpe's MS. Reports, No. 387. Harg. MSS. This *third* volume was also in Mr. Umfreville's possession with the other two; see No. 36, *ib.* in the second blank page. But the volume referred to here is not in the Museum. Burgoyne *v.* Spurling is reported at considerable length in No. 111, fol. 160, of the

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holder surrenders to the lord himself to the use of another; the lord thereupon said, "Now, Sir, your copyhold is in my hand;" and the lord entered; and the surrenderor brought an action against the lord, and adjudged it would lie. Agreeable with that was Berry and Green, in 36 and 37 Eliz. B. R. 3 Cr. 349. The lord, without cause, refuseth to admit the surrenderee; neither the surrenderee, nor the lord, but the surrenderor, shall bring this and other possessory actions. (*c*)

The principal case of Burgoyne and Spurling was, a copyholder, 20th April, surrendered, according to the custom, to two customary tenants upon condition for payment of money, 1° Julii; and in May following he surrendered to the use of another, then pays the money according to the condition in the first surrender; then surrenders to the steward to the use of the third and his heirs; and the two last surrenders are presented: and adjudged the second surrender was good; which it could not be if the estate was out of the surrenderor, and if the first surrenderee (whose money was not then paid) had any right. And there it was agreed that nothing passed by the surrender until it was presented in Court, and admittance thereupon, but the interest and right of the copyhold; and the possession remained with the surrenderor, so as he may transfer it to any other; and it shall be good if the first surrender doth not take effect.

So, Tr. 14 Jac. B. R., 2 Cr. 403, Frazell *v.* Welsh, a copyholder surrendered to two customary tenants; the surrenderee enters and pays the rent to the lord; the surrenderor dies before a Court, so that no presentment could be made; the heir of the surrenderor entered upon the surrenderee, and made a lease, and recovered against him.

If a surrender of a copyhold be presented, yet the surrenderee hath no more right till admittance than he had before the presentment.

Secondly, I conceive, though the surrender be presented, yet the surrenderee, till admittance, hath no more right than He hath but an inchoation of a right. (*d*)

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same collection. S. C. *ib.* No. 43, fol. 254. S. C. *ib.* No. 40, fol. 527, by the name of Burlinge *v.* Spurlinge, called Sir Orlando Bridgman's own note. See Appendix A.

(*c*) In Hughes's Querics, published 1675, is the following case:— "13. A copyholder in the presence of the lord doth surrender his copyhold unto the use of J. S. and his heirs. The lord refuseth to admit the *cestui que use*; J. S. surrenders to the use of J. D. and his heirs, and the lord doth admit J. D. In whom is the copyhold?" Hughes thinks in the first copyholder: but adds, "Quære if not in J. D.? For that it was said, that it had been adjudged that a copyholder may maintain trespass against his lord for his copyhold coming to him by purchase before his admittance." Roswell *v.* Welsh, 3 Bulstrode 214. is referred to by Hughes.

(*d*) "Till admittance the title (of the surrenderee) is in progress in-

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he had before; but a kind of inchoation of a right, like to a precedent condition, or contingency, *viz.* if he or his heirs be admitted; for the surrenderee, and if he die, his heir, till admittance, is still tenant to the lord. Nay (as the common practice is) the lord cannot enforce the surrenderee to be admitted, and become tenant; (unless there be a special custom, as there was in Baspole and Long's case, 3 Cr. 879, that the surrenderee shall come at the next Court before three proclamations made, or *forfeit* (*e*) it) for that the lord hath a tenant, the surrenderor, or if he die, his heirs; and there is one to perform the services; and therefore there is no prejudice to the lord. If there be lord and tenant, and the tenant make a feoffment, the feoffee cannot enforce the lord to avow upon him. But if the feoffor die, then he shall, of fine force, (*f*) avow upon the feoffee, because the heir of the feoffor is not his tenant: but when the surrenderor dies, the case is otherwise, for the heir of the surrenderor is tenant; and therefore after a surrender the lord cannot enforce the surrenderee to come into Court, and take it by copy, because he hath a tenant notwithstanding the surrender; and this is grounded upon good reason, for perhaps the surrenderee, or his heirs, will refuse, or not accept those bondage lands upon a bondage tenure, and oblige himself by fealty to the lord; and then it is no reason that the lord should have them, but that they should remain to the surrenderor. And if the surrenderee should enter after presentment before an admittance, and make a lease without licence, or commit any other act, which could be a forfeiture in the copyholder; yet the lord can take no advantage of it, more than of the act of a mere stranger; for that he was not, *revera*, copyhold tenant, and the land shall not be subject to the forfeiture both of the surrenderor and the surrenderee. But if a copyholder in fee die seised, his heir is in by descent, and is tenant before admittance; and therefore the lord may force him to take up by copy, and pay a reasonable fine for his admittance, and may call him by proclamations (when the custom is not more narrow) at three several Courts; and if he come not, may seise the copyhold as forfeited; and I take it, the custom pleaded accordingly in Sir Richard Lechford's case, 8 C. 99, is but the general custom as to copyholders.

The lord cannot enforce the surrenderee to be admitted, and become tenant.

C. C. 269. b.

3 Cr. 166. Pennant's case.

If the surrenderee should enter after presentment, before admittance, and make a lease without licence, or commit any other act, which would be a forfeiture in the copyholder, yet the lord can take no advantage of it more than the act of a mere stranger.

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choate and incomplete." Vice Chancellor in Wainwright *v.* Elwell, 1 Madd. 633.

(*e*) This word in the manuscript is "*insert.*"

(*f*) "That is, of necessity," note to C. C. 269. a. by Butler.

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The surrender of a copyhold binds the land and estate and interest; so that, if it be presented at the next court, all mesne acts will be void by relation, after admittance, as against the surrenderee, or his heirs.

Thirdly, I conceive that, though neither the surrender, nor presentment properly creates a right nor interest, yet the surrender binds the land, and estate, and interest; so that (*g*), if it be presented at the next court, all mesne acts made or done afterwards, will be void by relation after admittance, as against the surrenderee, or his heirs; and so is the resolution in Burgoyne's case, before cited.

[And many cases may be put upon this ground. I shall put only that of Porter and Porter, cited C. C. fol. 59.; and it is 2 Cr. 100. Mich. 3 Jac. B. R. Two joint copyholders in fee, one of them surrenders to two customary tenants, and dies before it be presented; though the survivor comes paramount, and should avoid a rent-charge in such case, yet that is an interest (by relation) which binds the land, and anticipates the survivorship; and, therefore, is not to be compared to the case of attornment, nor, indeed, *in omnibus*, to any cases upon conveyances at common law.]

P. 13. Jac. B. R. Ford and Hoskins.

And this, though it cannot be termed a right in the more strict notion of the word; for he hath neither *jus ad rem*, nor *jus in re*, till admittance, as it is said, 2 Cro. 368; it is not a *jus*, as it is decided in Nichols's case, Com. 487, [*Jus intrandi, jus recuperandi, jus habendi, jus retinendi, jus possidendi, jus fruendi;*] which, it is said by my Lord Hobart, in my Lord Sheffield's case, 335, 336. is not an exact enumeration of rights. There are *jura alienandi, extinguendi, renunciandi*, &c.; yet it is a right, *talis qualis*, as my brother Glynn called, such a kind of right as hath a descendible quality with it. That is agreed in our principal case on both sides; for both they who claim as heirs at common law, and they who claim in borough English, claim as heirs: and they cannot claim as heirs, unless something in truth flowed from the ancestor; and he that in truth is heir may, in a court of equity, enforce the lord to keep a court, and admit him, 4 Cr. 28, Westwick's case; though not by action of the case, 1 Co. 368. And so I may call it *jus compellendi*, a right of compelling the lord to admit him: *cestui que use* at common law, and *cestui que trust* at this day hath such a right to enforce the feoffee to execute an estate according to his trust.

He that is heir to a copyholder, may, in a court of equity, enforce the lord to keep a court, and admit him.

Surrenderee of copyholds,

To apply all this to our principal case: when Went surren-

(*g*) Sir Orlando Bridgman, in this passage, and in p. 25. seems to consider *presentment* essential, although the surrender is made by the hands of the steward. See 1 Watkins on Copyholds, 128. 2d ed. and Scriven, 288. 2d ed., where the conflicting opinions on this subject are discussed.

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dered to the use of Nathaniel Richer, and Nathaniel Richer died before admittance; at the time of his death he had, in a strict sense, no right to the possession, and no right to the tenement. But yet there descended from him *quoddam jus*, or *scintilla juris*, as you may call it; a right in the larger and more general sense upon a contingency: that is, if it be afterwards presented (which the steward by his duty, or customary tenants, who took the surrender, ought to do) a right to compel the lord by a suit in chancery, to admit him; which right descends to his heir.

who dies before admittance, had, in a strict sense, no right to the tenement; but he had a scintilla juris, a right, in the larger sense, upon a contingency, *i. e.* if the presentment be made, he had a right to compel the lord by a suit in chancery to admit him; which right descends to his heir.

And whether the custom found in one case extends to, or hath any influence upon this right in the more general sense, is the second thing to be considered; and, indeed, is the principal matter of the case.

The question is but this:—

Whether or no a custom for copyhold land to descend to the youngest son, brother, or nephew, shall extend to the youngest son, brother, or nephew of the surrenderee, who died before admittance; so that such youngest son, brother, or nephew, shall have the copyhold land, though the surrenderee never had it.

This question I must answer with a distinction. I do conceive, for my own single opinion, that the custom may be so laid, that the youngest son or brother of the purchaser, though not admitted, may inherit. As for the purpose, if the custom were laid here (as I think the evidence will bear it) that all the customary land within the manor is of the nature of borough English, or gavel-kind, and shall descend to the youngest, or all the sons, I conceive in such case the heir in borough English, or gavel-kind, shall inherit; for it is not only a custom fixed in the land, but such a custom which the law takes notice of. The law takes notice of the custom of borough English and gavel-kind, what they are, and the *incidents* (*h*) thereunto, and the consequences upon such a custom. And though it be true borough English custom, *primâ facie*, gives only to the youngest son, yet upon that foundation of alleging it to be borough English land, such an addition, or enlargement of it, to go to the youngest brother or nephew, may be made; it being agreeable to the nature of a borough English custom.

A custom as to descents of copyholds, may be so laid that the youngest son, or brother of the purchaser, though not admitted, may inherit.
If a custom were laid, that all the customary land within a manor, is of borough English, or gavel-kind, and shall descend to the youngest, or all the sons, the heir in borough English, or gavel-kind, should inherit, although the ancestor had not been admitted.

But if you set forth a particular custom, whereof the law takes no further notice than as you allege it, there the custom shall be taken strictly, as you allege it, and shall extend no further.

If a particular custom is set forth, whereof the law takes no further notice

(*h*) A blank in the manuscript.

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[I shall not need to instance in cases to prove that rule, Baspole and Long's case, P. 44 Eliz. B. R. 3 Cro. 879. A custom upon a surrender to one and his heirs, that he shall take it up at the next court, or forfeit, extends not to a surrender to one for life, and after to the use of another and his heirs. So a custom of descent to the youngest son shall not extend to the youngest brother; resolved in Burgoyne's case.]

than as it is alleged, there the custom shall be taken strictly as alleged, and shall extend no further (*i*).

And that is our principal case here, and herein my two brethren and myself agreed; for here the custom of borough English is not found: but they find a custom within the manor, that all customary lands have descended, and ought to descend to the youngest son, &c. This custom, in the letter of it, clearly reacheth not the youngest son of the youngest brother of the surrenderee; for it extends only where customary lands descended: but here the land did not descend; at the most it is but a right that descends, and that not a right to the possession, nor a right in the proper sense, but a right at large, and upon a contingency, and *talis qualis*, and no more.

The custom is *descenderunt*, not *devenerunt*.

Secondly, this custom only extends to a descent; and, therefore, shall not extend to other cases: ours is only *an initiate title to a purchase, when there was no descent.*

And, thirdly, the custom, as it is found, must be understood of a descent from a copyholder *in facto*, whereas ours is of a copyholder *in fieri et in potentia* only, there being actually another copyholder when Nathaniel died. Suppose after the death of Nathaniel the surrenderee, Went, the surrenderor, had died, Went's younger son would have had it by this custom. Both Went's younger son, and Nathaniel Richer's younger son, could not claim it by the same custom, as it is found in the verdict. So that the custom here alleged begins not time enough in our case. The rise of the custom to make this inheritance to come to the youngest is precedent, and must originally begin from the surrender to the use of Nathaniel and his heirs: but here the custom is laid to begin at the descent, *viz.* that the custom is, that copyhold lands *descenderunt filio natu minimo*, &c. and so begins at the descent, which cannot be but where the ancestor was a copyholder: but Nathaniel here was no copyholder; and nothing was in him, whereupon this particular custom, as it is in the verdict, could attach.

That was the reason of Justice Jones and Justice Croke, in Reeve and Maltster's case, that the custom was, that the lands should descend to the youngest son *tempore mortis*, and not to the youngest son generally. The case was in 11 Car. B. R.

(*i*) 2 Atk. 190. Dean and Chapter of Ely *v.* Warren, as to this rule being relaxed in equity.

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MS. Report (*k*).

and is in Justice Cr. 1 Rep. 411. I was present at the argument, and took the report of it much more largely than it is in the print. The case was, George Reeve, a copyholder in fee, where the land was descendible to the youngest son, surrendered to the use of himself and his wife, and his heirs; and they were admitted accordingly, and he dies, having three sons, William, George, and Charles. The reversion, after the wife's death, descended to Charles, who died without issue, living his mother; and, after, the mother dies; and the question was, whether William, the eldest son, as heir to his brother Charles, for the custom went not to the collateral line, or George, the second son, as heir to his father, should have it. Justice Jones and Justice Croke held, that William the eldest son should have it; for the inheritance by the father's death fixed in Charles by the custom; and the custom hath its operation in him who was the youngest son, *tempore mortis* of the ancestor; and George was not the youngest son when the father died. But Justice Barkley, and Bramston, Chief Justice, held, that it being but a reversion expectant upon an estate for life, which descended to Charles, and he dying during his mother's life, George shall make a title from his father, who had the last freehold, without mentioning his brother. I will not take upon me to determine the law in that case, which was controverted between so learned judges: but there the custom was found (as my report is) that if any person died seised *in feodo simplici, tunc post mortem hujusmodi tenentis*, the land should descend *filio juniori*; and thereupon they laid the weight upon *tempore mortis, et post mortem*; and held, that the infant *in ventre*, born *post mortem*, should not inherit; and the two other judges held the contrary.

But if the verdict had been found in that case, or, as I think, in this case, that all the copyhold land within the manor was of the nature of borough English, and descendible to the youngest in the collateral, as well as in the right line, then, I conceive, though Nathaniel died before admittance, yet it should go to the youngest, according to the notion of borough English; for this way of descent is a quality inherent in the

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(*k*) This case is not in the volume of Sir Orlando Bridgman's Notes, taken between the years three and thirteen of Charles the First, No. 40. of the Harg. MSS. It is reported in the Hargrave Collection, No. 378. folio 71., and in the Harleian Collection, No. 4811. Tr. 11 Car. B. R. From the copiousness of the last mentioned manuscript it may be presumed to be the report taken by the Chief Justice when at the bar, although preserved by the name of Paynell's Manuscripts. See Appendix B.

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land, and fixed in it; and the nature of that land is known in the law.

The cases of freehold borough English, and copyhold borough English, as to this point vary not at all, as it was agreed in that case of Reeve and Malster. Then my reason is this,—something there is, (call it what you will) that the heir is entitled unto, as heir to this land from Nathaniel Richer. It is clear the heir hath a right to enforce an admittance in a court of equity, and an admittance as heir; and such a right as neither the lord nor a stranger can intervert. This savours of the land; and as those waters which spring from or run through a chalky or mineral ground participate of the nature of the soil, so doth this right participate of the nature of borough English. The pleading of the custom of gavel-kind, as you may see, O. E. 143, is "*Quæ quidem 7 acræ terræ sunt, et a tempore quo non extat memoria fuerunt de tenura de gavelkind, quodque omnia terræ et tenementa, ejusdem tenuræ in eodem comitatu sunt, et secundum consuetudinem in eodem comitatu, a tempore quo non extat memoria usitat. per totum idem tempus, inter hæredes masculos partibilia, et partita fuerunt*:" and so I conceive it may be pleaded for borough English, that all lands *infra burgum*, or *manerium prædictum*, are *de tenura de borough English*.

But in O. E. 627. the custom is pleaded, that when any person seized in his demesne as of fee, according to the custom of the manor, of any lands held of the manor at the will of the lord, according to the custom of the manor, shall have two or three sons, and shall die seised of such an estate, that the tenements do descend, and time out of mind by the custom of the manor have descended to the youngest son of that person, who died seised in fee aforesaid, this custom, thus pleaded, I conceive would not help in our case, although it be not pleaded as it was cited by Justice Croke, that it descended to the youngest son, *tempore mortis*; for no such words are in the pleading; but the reason is, it is alleged as a particular custom, and begins with a descent, which cannot be without admittance, that the ancestor was actual copyholder; and so the custom begins not high enough. But lay it that the land is of the nature or tenure of gavel-kind, or borough English, it is otherwise, C. C. 110 b. Lands within a manor may by custom be deviseable, or of the nature of gavel-kind or borough English. For the customs of gavel-kind and borough English are taken notice of in our law; and the custom being fixed in the land, whatsoever concerns the descending of the land shall have a relish of that custom. 1 Co. 88, Corbet's case: Feoffment *al*

The customs of gavel-kind, and borough English, are taken notice of in our law.

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use de B. E., et trust irra al puisne. So if a rent be granted to a man and his heirs out of borough English lands, so shall a right, if a man be disseised of borough English land; 22 E. 4. 24; and 3 Co. 20, 21. Wellock and Hammond's case. Borough English land devised *al eigne fils et ses heirs payamt 40s a son fils;* this word *paying* makes a limitation, and nothing but a possibility, or contingency remained; yet it hath descended to the youngest son.

It may be objected, these cases are where the ancestor was once an actual copyholder; not where he never was: and I agree that distinction holds not in our principal case as it is pleaded; but I urge them only to shew the difference where the custom is pleaded as a particular custom, and where it is wrapped up in the general customs of borough English and gavel-kind. But I say where the heir claims as heir, though but by a *quasi* descent, as in the case of gavel-kind, or borough English tenure, the law is the same as when the ancestor was seised. 1 Co. 99 a, Wood's case, cited in Shelley's case, is notable to this purpose. A. covenants with B., that when I. S. shall infeoff him of the manor of Dale, he will stand seised of the manor of Dale to the use of B. and his heirs; B. dies, his heir within age; then I. S. infeoffs A., the covenantor, of the manor of Dale: the heir of B., the covenantee, shall have the manor of Dale *quasi per* descent; and shall be in ward for it. And yet neither right, title, use, nor action descended to him, but he was in by course of descent; for it might have by possibility vested in the ancestor, and he could not have but as claiming from that ancestor; and, therefore, I conceive that if that land in Wood's case had been borough English, or gavel-kind lands, it should have descended accordingly. And the rule is put in Shelley's case, 1 Co. 98, where the heir takes any thing which might have vested in the ancestor, the heir shall be in the nature and course of descent; which rule would have held in our case, if the custom had been so largely set forth as to have extended to it the inchoation, a commencement of it *in the surrender*, which was in the life of Nathaniel Richer, the ancestor; and the law having once allowed, and taken in the custom, as well estates as descents shall be directed by the rule of the common law, as necessary consequences upon the custom, as it is said, 4 Co. 21, in Brown's case.

In cases of private custom, whatsoever is not expressly laid to be the custom *dispositioni juris relinquitur;* and is all one with a negative or exclusive custom. For example, suppose the custom had been laid by particular and express words, that the custom of the manor is, that in case only where customary

In cases of private custom, whatsoever is not expressly laid to be the custom is all one with a negative or exclusive custom.

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lands do descend, the youngest shall have it; this could not extend to the heir of one who was never admitted; for the ancestor had not the land. Nor, secondly, did the land descend; so that I think it clear, if the custom had been so negatively or exclusively laid, it could not have been extended further than an affirmative private custom, extending no further than the letter. It is all one by construction of law, as if there were exclusive words of what is not within the words or letter of the custom, as it is pleaded.

It is all one by construction of law, as if there were exclusive words of what is not within the letter of the custom.

The old rule in law is good, *multa transeunt cum universitate quæ seorsim non transeunt*—they will pass as incidents to a general custom. If a man shall plead a custom within a county, to have traitor's goods, or *catalla felonum*, which are not prescribable, this is naught; it is a particular custom, for that is particular (let it extend as far as it will as to place) whereof the law takes no notice, further than as it is, in all particulars, pleaded, or alleged. But if one shall entitle himself to a county palatine by prescription, as in the case of Chester or Durham, the others follow as consequences. So that, if a man say that the lands in such a manor or parish are of the nature of gavel-kind, or borough English, the law takes notice of it as a general custom, and that the land shall always go accordingly; and there not only a descent, but a *quasi* descent, any interest which is claimed in the land as *by* (*l*) an heir, I conceive, partakes of the nature of it; and being taken to be gavel-kind or borough English land, all the incidents and circumstances belonging to land of that nature accompany it: and, therefore, *if* (*m*) I create a rent *de novo* of such land, it shall partake of the nature of it. But if you allege a particular custom, the land shall descend *juniori filio:* the law takes that custom as you allege it, and enlarges it no further; and therefore, I hold in that case, upon such a particular custom, *if* (*n*) you will avow for a rent granted one of borough English land, and maintain it by that custom, it is not good. Now then a custom to grant land by copy shall extend to grant rent out of that land by copy; which yet is a far stronger case than the plaintiff's case.

That is a particular custom whereof the law takes no notice, further than as it is, in all particulars, pleaded.

A custom to grant land by copy shall extend to grant rent out of that land by copy.

My brother Tyrrel, who held the contrary opinion, that as this custom is found, the youngest son or brother shall have it, he takes the objection against him to be, that by the custom there ought to be a descent; and there can be none here, because the ancestor was never in possession; and he gives a

(*l*) *By*, not in the manuscript.
(*m*) *If* inserted in the handwriting of Mr. Hargrave.
(*n*) *If*, not in the manuscript.

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threefold answer to it. First, he says, that if A. surrender to the use of B. and his heirs, and B. dies before admittance, his heir shall be admitted; and yet no man claim as heir to another who never was possessed; and to claim as heir, and to claim by descent is all one; secondly, he says, the heir at common law may claim by descent as heir, or *quasi* heir, and therefore so may the youngest; thirdly, if the youngest cannot claim by the custom for default of possession, by the same reason the eldest cannot, and so the surrenderor might keep it.

Answer.—If I had granted his premises, yet under pardon, it touches not my conclusion; for I do not say there cannot be a customary heir, where the ancestor was not in possession; and there cannot be a *quasi* descent of customary lands: but I say this private custom, as it is set forth, extends not to such an estate. A private custom is, that a *copyholder* (*o*) may make a settlement: he shall not make a lease and release, and that is *quasi* a settlement: but I should deny some of his premises if there were time; and it concerns not our case in question, but it concerns that only wherein I have given my single opinion.

But, secondly, the custom shall not be taken strict, but a *quasi* descent shall serve for a real descent, as if borough English land be let to A. and his heirs for the life of B., and A. dies; his heir is in by a *quasi* descent. I answer, first, as the case is put, it proves for use; for you allege the custom to be borough English. But if you did lay it, a particular custom that fee simple lands shall descend to the youngest, I deny the law to be so; for it is not within the compass of the particular custom. But, secondly, there was a real descent, and not a *quasi* (*x*) descent; an estate actually descended, though not with all the qualities of a descent, in respect of the exility of the estate.

Thirdly, he objects, that it is better to find the custom particularly, in express terms, than to find it in the nature of borough English. First I say, it is not better; for the law takes notice of the terms borough English and gavel-kind. Secondly, If all the consequences and incidents to a general custom of borough English, &c. were alleged in a particular custom, I take it the law would be all one, but they are not.

And whereas he says, borough English is a custom that the youngest shall inherit, as heir to his father. First, he describes it—he defines it not, nor pleads it. Secondly, the heir may inherit, and yet the land not descend. But the custom here being alleged as a private and particular custom, the court

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(*o*) Mr. Hargrave supplies the words "copyholder" and "*quasi*" to blanks here.

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cannot take any other notice of it than as it is found by the jury; and the commencement of the custom being grounded on a descent, *viz.* that the lands *descenderunt, et descendere debent filio* or *fratri juniori*, we cannot extend it to a higher beginning; and therefore it reacheth not to our case, where he from whom the title as heir is derived was never a copyholder, and so could not transmit a descendible estate, or right; and, therefore, as to the matter in law, as this custom is found, I think judgment ought to be given against the plaintiff. (*p*)

There is another question in this case on the special verdict; the jury find that Went and his wife surrendered to the use of Nathaniel Richer, his heirs and assigns, *pro ut* by the copy read in evidence appears; *tenor cujus quidem copiæ sequitur in hæc verba*, and so finds the words of the copy itself under the steward's hand, 6 Ap: 24 Car.; in which copy it is also recited, that it was further found by the homage, that Nathaniel died *ante hanc curiam*, and *et ante admissionem suam; ideo modo ad hanc curiam* came Margaret, Elizabeth, Rose, Anne, and Susan, and as cousins and heirs of the said Nathaniel; *viz.* daughters of Robert, his eldest brother, deceased, pray to be admitted, and are admitted, and concludes, *extr. per J. D. seneschall:* and then the special verdict goes on, and finds the death of Nathaniel before admittance without issue, and that the said Robert was his elder brother, and had issue the said five daughters, his coheirs; and find that John was youngest brother, and the lessor was his youngest son, and survived

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(*p*) In Lord Raymond, 1025. the case and this first point are noticed in the following words: "The common law takes notice of these customs of gavel-kind and borough English; and there is a very remarkable case adjudged in my Lord Bridgman's time, which is not reported in any printed book; it was in the years 1660, 1661, and it was entered Hil. 1655. Rot. 779. C. B. into Hale and . There the case was, that copyhold lands of every tenant dying seised were descendible by the custom of the manor to youngest son; and a surrender was made to the use of B. and his heirs, who died before admittance. If B. had been admitted, it was agreed that after his death the youngest son should have inherited: but dying before admittance, the question was between the eldest son and youngest son of B., who should have the lands; and it was adjudged that the eldest son in this case should inherit, because of the straitness of the custom; that the land should *descend*, and so here was no estate in the ancestor to descend, there never being any seisin in the ancestor. But by *my report*, it would have been otherwise, if it had been alleged that the lands were of the nature of borough English (which it was not, but only set forth as a particular custom) because the law takes notice of the custom of borough English, but not of that special custom; and in pleading that lands are of the nature of borough English, you need not set forth the custom specially for that reason."—Lord Raymond. 1025.

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his father; and found the admittance of the lessor, the 6th of Ap: 24° Car.; but find not the admittance of Robert the elder brother's daughters, nor make any mention of it otherwise than as it is recited in the copy. So that I hold it clear, that upon this verdict, it shall not be understood that the daughters of the elder brother, who were heirs at law were admitted, for it is not found by the jury that they were admitted; for though the first copy, which is found *in hæc verba*, recites that they were, yet the jury do not here find it; and so is no verdict of this jury. Secondly, The reference to the copy was not generally by the jury, as to all the matter contained in it, but only as to the surrender to the use of Nathaniel; and it would be mischievous to make a recital in a copy to be a verdict of a jury in that to which they refer not; perhaps it is not true; and if it be construed their verdict, the jury are subject to an attaint for that which they found not.

Where the admission of a copyholder is recited in a court roll, and the court roll is found as a special verdict, that admission is not part of the finding of the jury.

This I take for law, and yet I think judgment ought to be given against the plaintiff. For as I have held the younger brother's son, whose lessee is plaintiff, hath no title, because the custom as it is pleaded began not high enough, but only as the descent; then the case is, a copyholder surrenders to the use of Nathaniel Richer, his heirs and assigns, who dies before admittance, the lord admits the lessor of the plaintiff, who is not heir, who enters, and makes a lease; and his lessee brings an action of ejectment against the right heirs of the surrenderee, who never were admitted. It is not much material to the case whether the lessor was admitted as heir, or generally; but it is found only that, *petiit se admitti, et admissus est*, without any mention of his being heir to the surrenderee; neither do I lay any force upon it, that the defendants had the right to be admitted; for till their admittance as to any possession, or possessory actions, they are all one as mere strangers, as I have shewed before.

He who is entitled to a copyhold is a mere stranger as to any possession, or possessory action, till admittance.

But I hold the admittance of the heir of the younger brother in this case to be void; for when Went the copyholder surrendered to the use of Nathaniel, his heirs and assigns, Went is still tenant till there be an admittance according to his surrender. The lord, as I said before, is but an instrument through whom the estate passeth; and, therefore, if the lord admit upon a surrender a wrong person, he may after admit the right person. Nay, till such admittance of the right person, the copyholder who formerly surrendered, as I conceive, hath the estate; for his surrender was *ad usum* such an one and his heirs; that is, so as such an one or his heirs be admitted. Westwick's case, 4 C. 28. is full as to that point. The lord hath only power to make admittance *secundum formam et ef-*

If upon a surrender of copyholds the lord admit a wrong person, he may after admit the right person; and till such admittance of the right person, the surrenderor hath the estate.

The lord hath only power to make admit-

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tance according to the form and effect of a surrender.

fectum sursum reddítionis ; and, therefore, the granting it over to another is without warrant, and as if there were no surrender at all. And the case I put before is strong as to this point; a copyholder surrenders into the hands of the lord, who accepts the surrender (which is tantamount a presentment) and after the lord enters, the copyholder who surrendered may bring his action; for the surrender was only to a special purpose, and till that takes effect the estate remains in the surrenderor.

So in our case, it appears the youngest brother's son had not any title by this custom as it is found; and that the admittance of him was not according to the surrender of Went; and then consequently it is a void admittance, and the estate is still in Went. And admit the defendants have no right, yet they are not guilty to the plaintiff, or his lessor. And though it is found that the lessor of the plaintiff entered and made the lease, and no entry is found of the daughters heirs at law before they commanded the defendant to enter upon the plaintiff, yet the Court, upon this verdict, shall not intend thereby a priority of possession; for that it is not found that Went, the surrenderor, was ever put out of possession; and, therefore, it shall not be intended but that according to his right he continued his possession. He might, perhaps, be in possession, and perhaps not; and we shall not attaint a jury upon conjecture. And so upon the whole matter I conclude that no title upon this verdict appear for the plaintiff; and that judgment ought to be given for the defendant (*q*).

(*q*) In the short note of the case, in the 55th number of the MSS. the second point is thus stated:—

" Another point was, whereon we agreed:—the special verdict finds the death of the surrenderee, and the admittance and entry of the youngest nephew, and his lease to the plaintiff, and the entry of the defendant by the command of the heirs at law, and ousting the plaintiff; who thereupon brings his action; that, though the lessor of the plaintiff was admitted, yet not being, (as we have taken the law) heir to the surrenderee, this admittance creates him no title; but he is, as against those who have right, a wrongdoer, notwithstanding his admittance; and that priority of possession, nevertheless, would give him and his lessee title against the defendant. But it appears by the verdict (the heirs at law not being found to be admitted, to whom the right of admittance belonged,) that the estate was in the surrenderor; and it is not found that he was ousted by the lessor or the lessee; and then the defendants are guilty to him, and not to the plaintiff. And the difference is between a priority of possession, where the title appears to any other third person, and where a title appears in a third person, And it appears not that he was ousted of possession; for entry and expulsion of the plaintiff prove not necessarily entry and expulsion of the surrenderor; and shall not be supposed, because the law will not suppose a tortious act."

- *Vide* 5 Co. 97. Goodall's case; and *quære*, if there be not a difference upon a special conclusion, where there is no title for the defendant; for it is time enough for him if the plaintiff have no title; and where no title at all appears for the plaintiff.

Vide 3 Co. 438. Bateman *v.* Allen.

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Adjudged *pro defendente per opiniones* Bridgman, Hyde, Tyrrell; Browne argued al Cᵒ. 28 April 1662. Intr. 1659. R. 1236.

(Devise of realty and personalty to the wife of the testator for so many years as she should live sole; remainder, if she should marry or die, to the next heir male of the body of his first son, and to the heirs male of his body; remainder, in default of such issue, to the second son, if then living, and if dead, remainder as before; and so to the third son; and so to Thomas (fourth son of the testator) "if he be then living; and if he be dead, then to remain to the *next* heir male of the body of Thomas, and to the heirs male of his body begotten, and to be begotten for ever." Thomas takes an estate tail by this devise; and so much the rather, as such construction is required by other clauses in the will, expressing the *general intention* of the testator (*a*).)

This term (*b*) the case of Petty and Goddard was solemnly argued in the Court, and Justice Browne argued for the plaintiff. Tyrrell *propter ægritudinem* was absent: but declared his opinion to agree with Hyde and myself, who argued for the defendant; and judgment given accordingly. And after Mr. Smith, father of the plaintiff's lessor, moved for moderation of costs, and said he would prosecute no writ of error, being, as he said, satisfied the law was against him. See the case in my argument at large.

Harg. MSS. No. 5, fol. 103.

BRIDGMAN C. J.

Robert Petty hath brought an action of trespass and ejectment against Edward Goddard, of the moiety of twelve mes-

Harg. MSS. No. 57, fol. 118. Argument at large.

(*a*) See Fearne on Contingent Remainders, p. 150, &c. 181, &c. 7th edit. and see Jesson *v.* Wright, 2 Bligh. 1. Doe d. Wright *v.* Jesson, 5 Maule and Selwyn 95. & 1 Preston on Estates, 346, &c.; and see Appendix C.

(*b*) Easter 1662; 14 Car. 2.; but the Roll 1659, rot. 1236. seems to be incorrect.

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suages, twelve gardens, two hundred acres of land, sixty acres of meadow, two hundred acres of pasture, and one hundred acres of wood, with the appurtenances, in Ogbourne Measey, Ogbourne St. Andrews, Ogbourne St. George, and Ramsbury, upon the demise of John Smith, October 1, 1659, from Michaelmas then last past, for five years. Upon Not Guilty pleaded, a special verdict is found.

Special verdict. W. G. had issue four sons, William, John, Vincent, and Thomas, and devised his lands in A. to his wife for so many years as she should live sole. Remainder, if she should marry or die, to the next heir male of the body of William, and to the heirs male of his body. Remainder, in default of such issue, to John, if then living, and if dead, remainder as before; and so to Vincent; and so to Thomas, if then living; and if dead, remainder to the next heir male of the body of Thomas, and to the heirs male of his body for ever.

That William Goddard the elder, *diu ante*, &c. was seised in his demesne, as of fee, of the entire tenement in the declaration mentioned, and held the same in socage; and had issue, William, John, Vincent, and Thomas Goddard; and being so seised, 8th September, 1597, 39 Eliz. made his last will and testament in writing, *inter alia in hæc verba*:—" I give, will, and bequeath to Elizabeth my wife all the profit, advantage, use, commodity, increase and benefit, yearly, and from time to time arising, increasing, growing, and coming by and out of my dwelling-house; and of and by all my lands, meadows, &c. and hereditaments, in Ogbourne Meads, and Ray Meads, in the manor of Barton; and out of and by all my household stuff, implements of household, goods, stocks, stores, chattels, and cattle whatsoever, at the time of my decease, being in or upon the said house, and all other the premises; together with the benefit, use, profit, and commodity, of the lands called Blake's Wood, in the parish of Ramsbury. And for her better maintenance and training of her children, I give unto her all the tithes in the manor and town and fields of Ogbourne Measey, to my rectory of Ogbourne St. Andrews and Ogbourne St. George belonging. *Habendum* the said use, possession, profit, advantage, &c. of my said mansion house, lands, tenements, hereditaments, tithes, oblations, meadows, leases, pastures, and all other the premises before expressed, unto her, from my decease, *for and during so many years as she shall live sole.* And *if she marry or die*, upon the first of them which so shall happen, then the said goods, chattels, and all the premises, and every part thereof, with all and singular their appurtenances, shall remain, come, and be unto *the next heir male of the body of William my son, and to the heirs male of his body, begotten and to be begotten; and for default of such issue male*, then the said goods, chattels, &c. and premises to remain, &c. to *my son John, if he be then*

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living; and if he be dead, then the said goods, chattels, &c. *(verbatim ut supra)* and so to *Vincent*, and so to *Thomas*, if he be *then living;* and *if he be dead*, then the said goods, &c. to remain to the *next heir male of the body of Thomas, and to the heirs male of his body begotten and to be begotten for ever.* Proviso, and my express mind, will, and intent is, that if my wife, within a month after request by any of the overseers of my will, enter not into a bond of such penalty as the overseers shall like, containing the matter and effect in substance hereafter expressed; *viz.* with condition to pay and deliver all such chattels, leases, household stuff, chattels, and implements of household, as by this will she may have and use, not spoiled, &c. otherwise than by using thereof, in good order, but of as good value, or nigh it, as they shall be praised at after my death; or if any be worn, consumed, or spoiled, if she in satisfaction thereof pay other the like parcels of goods of the like nature, sort, and value, unto William, my son and executor, or *unto the eldest and next heir and issue male of his body lawfully begotten; and for default of such issue or heir male of his body, to the next in blood of my sons, and sons' sons which shall happen to be living*, and shall be my next heir male inheritable of my lands; so as my said goods may remain unto my heirs male with my lands, according *as though the same were land, and entailed unto my heirs male of my body*, at or before the day of her marriage again. [So much of my leases as shall in the mean time run out between the day of my death and the time appointed to deliver the goods and premisses before mentioned to be delivered or paid to my son William, and unto any other person unto whom the same shall appertain, according to the limitation aforesaid, and the value thereof, being foreprized.] She to stand free and not chargeable to restitution; or, if she remains unmarried, if her executors pay or deliver to my son William, he being then alive, or else to the next heir or issue male of my son William, lawfully to be begotten; and for lack of such heir male, or issue of his body, to the right and next heir male of me the said testator, all the said chattels, leases, household stuff, goods, and implements of household stuff, (except as before excepted) within forty days after her death; or if any of the said goods shall be consumed,

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altered, or changed, if she, her executors, &c. pay to my said son and executor, if he shall be then living, or to such other person as the same goods, household stuff, and other the premises be limited and appointed unto and shall appertain, according to the limitations aforesaid, other like parcels of goods of the like nature, in stead and satisfaction of the said goods so consumed, &c. then the said obligation to be void. And I further will that the overseers, from my decease, until my son William accomplish the age of twenty-four years, if he shall so long live; and after his decease, until such time as the next of my blood, to whom I have limited and appointed such portions and legacies, bequeathed to my son William, if he shall die before twenty-four years, (*aliquid deest in recordo et testamento.*) All and singular the revenues, profit, and commodity of my lands, hereditaments, &c. and of all chattels, goods, &c. bequeathed to my said son William, for the use of the said William, my son; and, after his decease, to the use of the next of my blood, to whom I have limited and appointed the same; and they the said overseers to use the said yearly profit of my said son, his livings and goods, to the best use, benefit and profit, &c. of my said son William; and of all others of my blood to whom his portion shall, may, and hereafter doth come and appertain.

William dies without issue, the wife dies; John enters, and dies without issue male;

They find the death of the testator, and of William the son, in the life of Elizabeth, without issue; and her death, unmarried; and the entry of John, and his having issue, Elizabeth and Lucy, his daughters and heirs; and his will, 26th April, 1621, *in hæc verba*, whereby he bequeathed his daughters each 1000*l.* to be paid at twenty-one, or marriage; and other legacies: "All my other goods, lands and leases, I give unto my brother Vincent Goddard, whom I make sole executor, desiring him to have a care to see this will performed;" and dies in 1635, Elizabeth being of the age of twenty-one. That Vincent entered, and in February 1642, died without issue. That Thomas entered, and was seised, *pro ut;* and sets forth a recovery, Hil. 1651, against Thomas, then tenant of the freehold, to the use of Thomas and his heirs.

Vincent entered, and died without issue: Thomas entered, and suffered a common recovery to the use of himself and his heirs.

They find that in September 1645, Elizabeth married P. Smith, and had issue John Smith, the lessor, and dies 25th October, 1653. And after find the will of

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Thomas Goddard, November 1653; by which the now defendant Edward Goddard entitles himself. And the death of Thomas Goddard in 1659; and the entry of Edward Goddard the defendant; and the entry of John Smith, as heir to Elizabeth, into the moiety in question, and lease to the plaintiff: *(note an infant and not by deed nor rent reserved)* and the entry and ejectment of him by Goddard the defendant. *Et si supra totam materiam* the defendant be guilty, *penitus ignorant, &c.*

Before I come to the point of the case, I must premise a few things. Cases of wills have more of trouble and uncertainty than other cases: First, They are commonly made when men are *in extremis;* and then reason is disturbed, and the business precipitated, or done by ignorant men who know not the law; or (if by lawyers) yet who have not time to know the condition and nature of the estate devised.

The testator's will is the law which must guide the judge.

Secondly, the testator's will is the law which must guide the Judge; his intent being obscure and uncertain, it is difficult to find it out; and as men have several fancies, so will their conclusions be different. In other cases we have *responsa prudentium praxin jurisperitorum*, ancient and modern expositions and authorities; here we walk untrodden steps. No will receives strength or authority from a resolution or judgment in another will; for every little circumstance differs it, and the will of one is no more to be compared to another's will, than the face of that man to the other man's face; some resemblance, but no identity; and it is rare to have so much as a proportion or analogy in reason, of one case to another.

No will receivesstrength or authority from a resolution or judgment in another will, for every little circumstance differs it: and it is rare to have so much as a proportion or analogy in reason of one case to another.

Yet some general rules there are, which direct us in the exposition of deeds and writings, but much more in wills, as:

Three General rules for the exposition of deeds, and much more of wills are,—

First, That the intent of the party, *quantum fieri potest*, be pursued in the construction of words.

1st, That the intent of the party be pursued, as completely as possible, in the construction of words.

Secondly, That there may seem to be a contrariety, or difference in one part of it from the other; or if in some part of it be more curt or obscure, in another more large; so that construction, as much as may be, is to be made, that all may stand, if it be agreeable to law; and not part taken in, and part rejected.

2dly, That construction be made, if possible, so that all the words may stand, if they be agreeable to law.

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Thirdly, In writing, especially in wills, *non tam attendenda est proprietas verborum quam rerum significatio.*

All these rules will fall in our case, and I shall keep within them: but I shall not raise my discourse upon these generals, but upon the particular words of their will.

3dly, That the mere force of the words is not so much to be regarded as the true intent of the matter.

I conceive, first, the intent of the devisor was, that his wife should have the land for her life, if she continue unmarried; for though it be a devise to her for so many years as she should live sole, and after her decease to another, I make no difference between that and a devise to her for life. If it were a devise for so many years as she shall live, it must be void as a devise of a chattel; for it is against the rule of law that a lease for years should be totally uncertain. C. C. 45. b. A parson makes a lease for so many years as he shall be parson, it is void, see 6 Co. 35. The Bishop of Bath's case, and 28 H. 8. Dyer 24. But in a will it shall be good; but not as a chattel lease, but as a freehold; she shall have it so long as she continues a widow as a freehold: and so is Com. Walden and Elkington's case 522., a devise to one from year to year during his life is agreed to be a devise for life; and in one case the latter words, if *she marry or die then the premises to remain to her son*, are a sufficient devise to her for life by implication, if there were no more in the case.

Devise of land for so many years as one shall live is void, as a devise of a chattel.

That a lease for years should be totally uncertain is against the rule of law: but it may be good as a freehold under circumstances. Implication.

This hath been agreed, that it is a good devise to her for life; and so I take it for granted, not being much to the end of our case, unless we should admit a contingency, for then it would be material, a contingent estate (though in a will) not being to be raised where there is no freehold to support it.

Next I conceive that the *general intent* of the testator in his will was, that upon the death or marriage of his wife, William, his eldest son, should leave it to him and the heirs male of his body, remainder to John and the heirs male of his body, remainder to Vincent and the heirs male of his body; and that the will must be expounded accordingly.

[In this point my brother Browne differs in opinion with me; for he holds the devise is to the wife for life, remainder to William for life, remainder to the next heir male of the body of William, as a single person, and as if it were to a first son, and to the heirs male of his body; with like remainder to John for life, omitting the other sons of William; and so to his next heir male of his body, as a single person, in tail male, and so over to all the rest.] And when I speak of an intent, I shall *not* (c) keep myself to an intent mental, foreign, or conjectural, as my Lord Hobart distinguisheth; for that were indeed

(c) "not" seems to be omitted in the manuscript.

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to make a will, but not in writing, which will not pass lands; but to an intent legally drawn out, *ex visceribus textus*, out of the written will itself, and the necessary consequences of the absurdities, and unreasonableness of any other exposition of the words.

Intent to be collected out of the will itself, and the necessary consequences of the absurdities, and unreasonableness of any other exposition of the words.

There are two clauses in the will whereupon the whole question depends. First, the devising clause, whereby he deviseth to his wife for her life, if she so long live sole, all the profit, advantage, use, commodity, increase, and benefit yearly, and from time to time coming of his house and lands, and out of all his household stuff, implements of household, goods, stock, and chattels whatsoever, at the time of his death being upon the said house, and other the premises; and if she marry, or die, then the said goods, chattels, and other the premises, with all and singular the appurtenances, shall remain, come, and be nnto William his son, if he be then living; and if he be dead, then the said goods, chattels, and all other the premises, to remain, come, and be unto the next heir male of the body of William, and to the heirs male of his body begotten, and to be begotten; and for default of such issue male, then the said goods, chattels, and all other the premises, to remain, come, and be unto John his second son, if he be then living; and if he be dead, then the said goods, chattels, and all other the premises, to remain, come, and be unto the next heir male of the body of John, and to the heirs males of his body begotten, and to be begotten; and for default of such issue male, then &c. to Vincent; and so to Thomas, if he be living; and if he be dead, then the said goods, chattels, and all other the premises to remain, come, and be unto the next heir male of the body of Thomas, and to the heirs males of his body begotten and to be begotten for ever.

The second clause is a provisional or conditional clause, whereby the testator directs a bond to be given by his wife; and also directs the effect of the condition of it to be, that the said goods and chattels, in case of his wife's marriage or death, either in specie or in value, shall be answered to those who are to have the land.

I need not strengthen myself so far as to ground my opinion upon this point, that an estate tail was created to the sons by the devising clause alone, if there were no more in the will; though I shall have occasion to say something to that point anon: but shall enforce my conclusion from both clauses together, both the devising and provisional or conditional clause, that there is an estate tail to William and the heirs males of his body, with like remainder to John, &c.; for I conceive this last clause may, by the rule of reason and law,

A latter clause may, by the rule of reason and law, expound a former obscure or ambiguous clause.

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expound the former, if there be any obscurity or ambiguity in it. For, first, it most manifestly appears, even by the devising clause, that he intended his goods and household stuff should go with his lands; and therefore in that clause he devised the goods as well as the lands, and that to all his sons in remainder, one after another. And not only so, but in the devise to all his sons he takes more particular care in the devise of the goods and chattels than of the lands. He devises *the goods and chattels, and all other the premises*—first, and particularly, *the goods and chattels*—the rest comes in after, and, in general, comprehended under the words *all other the premises*. And in the conditional clause also, the goods and chattels are coupled together; the words are, *so that my goods may remain unto my heirs male with my land, and according as though the same were lands, and entailed unto my heirs male of my body*. Secondly, If the conditional clause were merely foreign to the other, yet being in the same will, if any thing appear in it, though *a latere*, and by the bye, which gives light to the meaning of the former, it shall be made use of; and the law plays the herald, and marshals the words as they may best agree with the intent of the devisor, let them be placed in never so much confusion and disorder. But in our case, the provisional or conditional clause, directing how the goods should go with the land, (which by the devising clause were devised together with the land) hath a kind of dependence upon the other clause, and is most proper to explain it. In Sonday's case, 9 Co. 121. (which I shall cite hereafter more at large) the devise was to Samuel; and if he have no issue male, then Thomas to have it; if Thomas marry having a male issue, then his son to have it after his decease; if he have no male issue, then Richard to have it. It was limited, first to Thomas, without expressing what estate; secondly, it was limited to his son, which seems to carry it to his son as a purchaser, as strong as in our case the words *next heir male of his body*; yet, because there was a collateral clause of perpetuity, "if any of his sons, or their heirs males, issues of their bodies, go about to alien, their estates shall be void;" these words, though void as to that which was intended, of creating perpetuity, yet were agreed to expound the other, what he meant by *son*, before, *viz.* not one particular, but the heirs males of his body; and not to exclude any younger son, or other issue male, though he names the word *son*, and not heir male, in the body of the devise. It is true that there, indeed, the clause of perpetuity, by which the devising clause is expounded, concerns the land devised immediately; here it immediately concerns the goods. But that makes no difference; for before,

The law marshals words as they may best agree with the intent of a devisor, let them be placed in never so much confusion and disorder.

Words void for the purpose for which they were introduced into the instrument, yet may be used to expound other doubtful words.

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in one entire clause, they were devised with the land; and, by the intent of both clauses, are to go with the land; and so collaterally and explanatory it concerns the *goods*. (*d*)

Secondly, This being admitted, that the intent of both clauses of the will are, that his goods and lands should go together, when by the first part of the will he "devises the lands and goods to Elizabeth for life, and after her death the same to his son William, if he be then living; and if he be dead then the goods, chattels, and other the premises, to remain, come, and be unto the next heir male of the body of William, and to the heirs males of his body begotten, and to be begotten," with like limitations to John, Vincent, and Thomas, these words in the devising clause, *prima facie*, may seem to admit some ambiguity:—First, When he limits it to William without limiting any estate, but leaving it to the construction of the law, what estate he intended to William, and so to his other brethren:—Secondly, It may be a doubt, when he limits it to William, if he be then living, and if he be dead, to remain, come, and be to the next heir male of the body of William, and to the heirs male of his body, how the words *next heir male* shall be taken; whether collectively for all his heirs males, *et natos natorum et qui nascentur ab illis*, or only that single individual heir male which shall be after the death of William, or the other brethren: which of these senses the devisor intended, there is no doubt but the word "heir" may, and doth frequently, bear the former sense as well as the latter.

The word "heir" is frequently taken for all the heirs collectively as well as a single individual heir after the death of a limited tenant for life (*e*).

In the Register Judicial, fol. 6, in a deed, which is stronger, lands given to a man, *et hæredi masculo de corpore suo*; it is an entail.—39 Ass. pl. 20. a gift to J. S. and his wife, *et uni hæredi de corporibus eorum procreato, et uni hæredi istius tantum*; this is also an entail. [If the word *hæredi* were not a word of limitation, but a word of purchase, it were merely void; for it is not limited by way of remainder; as a grant to J. S. *et primogenito filio*, if he have no son at the time it is void; and so to a man *et hæredi*, if *hæredi* be taken a word of purchase, not limitation, it is void; for then there was none such *in esse*, *non est hæres viventis*.]

Entails.

Grant to J. S. *et primogenito filio*. If J. S. have then no son, the words are void. So grant to a man *et hæredi*, if *hæredi* be taken as a word of purchase, not limitation, it is void.

(C. C. 22 a. 20 b. agreed it is an entail, and words of limitation. Com. 29. Colthurst and Benshner is ano-

(*d*) Qy. "land."

(*e*) Fearne, C. R. 160.

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ther. Hob. 4 Jac. 2 Cr. 145. Molineux's case: My heir shall have the ordering of my lands, so long as he perform my will; and if my son and heir perform not my will, &c. So it extends to the heir of the heir. 3 Cr. 497. Bacon and Holt's case.)

And in Counden's case, in a will: "I make J. S. my heir," that word includes all heirs; and in Chadock's case, in 22 Jac. 2 Cr. 695., the survivor shall be heir to the other if he die without issue. And so a devise to J. S. and his heir, or to J. S. and the heir male of his body in the singular number, is an estate of inheritance.

Devise to J. S. and his heir, or to J. S. and the heir male of his body in the singular number, is an estate of inheritance.

Then see how the testator expounds himself in both these particulars; that is to say, what estate he intended to William, and what he intended by the word *heir*. In the other conditional clause concerning the goods (which are to come in lieu of those formerly devised, if those he embezzled or consumed) he ties not himself up to the former phrase, nor to the like limitation of estate to the next heir male, and the heirs male of his body, but varies it totally. First, He appoints security to be given by his wife in case of marriage, again that satisfaction shall be made to William, or unto the eldest and next heir and issue male of his body. It is copulative, *next heir and next issue*. The devising clause was, *next heir male of his body*. His grandson may be next heir male, and yet his son be next issue male. Then, secondly, for default of such, the words are, "to the next in blood of my sons, and sons' sons who shall be living, and shall be my next heir male inheritable of my land, so as my said goods may remain unto my heirs male with my land, according as though the same were lands entailed unto the heirs males of my body." He still uses the phrase *first*, instead of *next heir male*, which are the words of the devising clause; he hath sons' sons, and in the plural; and he describes those sons, and sons' sons, to be his next heir male, inheritable of his lands; he must be his, the testator's, *next* heir male, as well as inheritable; which, by the other literal construction of the devise in the former part of the will, may fall out otherwise, as well to goods as land. For if William, or John, have two sons, if the eldest son take and die without issue, the second son shall not have them, but must go to those who are not next heir male, or the other brethren by that construction which is made on the other side upon the devising clause. Secondly, He manifests his intent that the goods and the land shall go to his heir male, and that his goods, though they cannot legally be entailed, yet shall go as his lands, and be as though they were entailed; and he shews how entailed, and for what estate, *viz.* unto the *heirs males*

of his own body. [And it is observable, he varies the very phrase of *heir male;* whereas it is insisted upon, that the word is *heir male*, and must be understood a singular person, he shews here he means by it the same thing as *heirs males;* for he declares his "goods shall go to the next of blood of his sons;" he rests not there, but *and to his sons' sons*, which are more persons than one; he calls his heir male *singularis numeri*, and immediately after, "so as my said goods may remain unto my *heirs* male with my lands;" which manifestly shews he means the same thing by *heir male* as *heirs males.*] Thirdly, there is another clause, "if the wife die unmarried the executors to deliver the goods to William, he being alive, or else to the *next heir*, or *issue male* of William, lawfully begotten; or for lack of such issue, or *heir male* of his body, to the *right and next heir male* of me, the testator." These phrases, *the next heir or issue male of his body, lack of issue or heir male of his body, the right and next heir male of the testator*, and *heirs males* in the plural, all extend, in the testator's meaning, to the lands as well as the goods, though it be in the provisional, or conditional clause; and that, therefore, the former clause, whereby he deviseth to the *next heir male* of the body of William, and the heirs males of his body, is not to be taken according to the letter, but as it is after expounded in the conditional clauses. Fourthly, There are other clauses wherein he varies the phrase touching the goods, "if William be dead, as to *the next of my blood*, to whom I have limited the legacy left to William," and appoints them to manage the goods, and estate, "for the benefit of William, and of *all other of his blood* to whom his portion may come and appertain."

From all which clauses this follows: that he laid no particular weight upon the words *heir male*, which are mentioned in the devise, that we should be tied to the strict, literal, and legal construction, to extend it only to a single person; and, secondly, that his intent in this clause was, that his goods and lands should go to the *heirs males* of his body.

Upon which premises I infer this syllogistical conclusion. It appears by the will that his intent (expressed in it) was, that his goods and lands should go to the same persons. But his intent was that his goods should go to the heirs males of his body. *Ergo*, his intent was, that the lands should go to the heirs males of his body.

Or thus: it appears by the will that his intent was, that his goods and lands should go to the same persons. But his intent was not, that his goods should go only to the first heir male of William, or John, and not to the other sons of Wil-

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ham, or John; and therefore his intent was not, that his lands should go only to the first heir male of the body of William, or John, and not to the other sons of William, or John.

I know this is liable to an objection; first, that by this construction of the devising clause by the conditional, it would follow, that the devise must be to the heirs males of the body of the testator, and not to the several sons in tail in remainder. To which I answer, first, if it be so it will be all alike to the parties to this suit; for then Thomas had an estate tail. For I take it for law, if a man devise to the heirs males of his own body, his eldest son takes an estate tail to which his brethren are inheritable. But secondly, in a reasonable construction, he devising before to all his sons, in remainder, one after another; and then expressing his meaning, the *heirs males* of his body; it must be intended (that both may stand together) that he intended the lands to each of his sons and the heirs males of his body, in remainder, one after the other; it being the same in effect, and coming to the same persons who will be heirs males of his own body. And this exposition is genuine, and a proper meaning in construction of wills; for it is in substance to the heirs males of his body, where, after his death, it comes to those who are heirs males of his body, and to no other persons.

If a man devise to the heirs males of his own body, his eldest son takes an estate tail, to which his brethren are inheritable.

Another reason to enforce this exposition, that he intended an estate tail to every of his sons, and the heirs males of their bodies, is taken *ab absurdo*, from the unreasonableness and absurd consequences arising from the contrary exposition, that it is a devise to William for life, remainder to his heir male as a purchaser. Take it, first, literally as a conveyance at the common law of the land to Elizabeth, *durante viduitate*, and that after her death or marriage it should remain to William, if he be living; and if he be dead, then to the next heir male of the body of William, and the heirs males of his body, and for default of such issue male, then to remain to John, if he be then living; and if he be dead, then to the next heir male of the body of John, &c. I hold it had been a contingent remainder to the heir male of the body of William, and to John; for it was contingent, whether William would outlive his mother; and if he did outlive her, the heir male of William took not, by the letter of the conveyance. And also it was contingent, whether John would outlive both his mother and brother William; and if he did outlive, then his heir male took not: and in like manner it was contingent to the other brethren. The estate ought to commence at such time as the deed or will

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appoints it, and at no other time; and if the commencement be upon a contingent, or condition precedent, whichever happens, the estate never ariseth. And yet, I do conceive in our principal case, being a will, that Williams's estate is not contingent, upon a rule in law, *expressio eorum quæ tacite insunt nihil operatur*. William was heir at law to the devisor. If the words, *if William be then living*, had been out of the will, the law would have supplied them; William could not have the lands in possession, unless he outlived his mother; and have them he would if he outlived his mother, though these words had been omitted; for he was heir at law. [2 Cr. 415. Webb's and Herrings' case, which was cited: a devise to the son, after the death of the mother; and if his three daughters outlive the son and mother, they to have it for their lives, and then J. S. and J. R. to have it. Here is no contingent limitation, but only shews when it shall commence.]

But then, I take it, if you will have the heir male of the body of William to take in remainder, and as a purchaser, there is a perfect contingent, or condition precedent to his estate: for it is limited to the heir male of the body of William, if William be dead at the death or marriage of his mother; that is, in such case, and not otherwise, and it is not limited to the heirs male of William, if William survive her. [And in like manner the devise is to John for default of such issue male of William, then to remain to John, if he be then living; if he be dead, then to remain to the next heir male of the body of John;] and John surviving his mother and brother William, the heir male of his body could not take. As if I devise land to my wife for life, remainder to B. if he outlive her, for life, remainder, if B. do not outlive her, to C.; B.'s estate is certain, not C.'s estate. If B. outlives A., C. never takes; and that is in effect Colthurst and Benshner's case, Com. 29.; and is agreed to be so, 3 Co. 20. in Boraston's case. And in our principal case, there is no reason to make a construction against the words, unless the words *heir male*, be taken for words of limitation; and then indeed, coupling all together, the devise shall be taken to Elizabeth for life, remainder to William, and to the heir male of his body, and to the heirs male of the body of that heir male.

But if you will construe it as a devise to William for life, remainder to the heir male of his body, as words of purchase: first, you put in the words *for life*, which is not expressed in the will: secondly, you put out the words, *if William be dead, then to the heir male*; and William being heir, and the limitation after not being to the heir male absolutely, but, *in case William*

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be dead before Elizabeth, then to the heir male; (*f*) there is no cause to supply and add those words *for life;* or to take away the force of the other words; *and if he be dead*, that is dead in the life of Elizabeth, *then to the heir male;* and so to make it to William for life, remainder to the heir male, whether William die before or after Elizabeth: I say there is no ground to make such construction, for it is not warranted by the will itself; nor, secondly, by rational inferences, which would be allowed to avoid absurdities in the will, which, as I shall shew presently, will follow that construction. But if the construction be made of the words, *heir male*, as words of limitation; *viz.* to William and the heirs males of his body, then the whole devise hangs together without a *sub intelligitur;* or contingency, for then there was an express estate (it needed not a supply of words to express the estate intended). Secondly, there would be no contingency in the case, either of person or estate; William would have an estate tail, the word *heir* and *heirs* being, in case of limitation, as I have shewed, the same.

I have laboured the more in this to shew, that if you make the words, *heir male*, in the will, to be words of purchase, and the heir male to take as a purchaser, there will be a contingency, both of the person and of the estate; and all other the subsequent remainders which are so limited will be contingent, and depend upon that; for what I have said of William is applicable to John, who first outlives the mother; and so, upon that construction, outlived the contingency.

And, secondly, it follows by law, that whichsoever of the contingents happened, it put a stop to all other the remainders, and made them all void; for the limitation was to William, if he be living at the death or marriage of his mother; and if he be then dead, then to the next heir male of the body of William, and the heirs males of his body; and for default of such issue, then to remain to John, if he be then living; then—when? It must relate to the time when Elizabeth died. If William had outlived his mother, then, according to the letter, all the other remainders had been void. And so it is, John outliving his mother and brother William, all the subsequent remainders to his next heir, and to his brother Vincent and Thomas, by the common law, in construction of a deed, penned as this will is, and by the literal exposition of the will, are void; for no re-

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(*f*) If it had been devised to "William, and the next heir male of "his body, and the heirs males of "his body, is clearly an estate tail." Original note in the margin of the manuscript.

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mainders are limited to John, if William or his next heir male were living when Elizabeth died.

And the same reason extends to John; the limitation is to John, if he be then living; and if he be dead at Elizabeth's death, then, and not otherwise, to his next heir male, and the heirs males of his body, and then, and not otherwise, for default of such issue, it is limited to Vincent; and so on to Thomas; and so the contingent, or condition precedent, to the estate of John, *viz.* his surviving his mother, and William, his brother, being performed in John, all the other estates depending upon the not performance thereof, cannot rise; and the consequence thereof would be, in such a deed, and must be in this will, upon such a literal construction, that if any of the sons had outlived the mother, he should have had it, and all the remainders would have been void; which is most manifestly contrary to the intent of the devisor; who, as appears upon the whole context, both of the devising and conditional clause, intended that his several sons, for default of issue male of the other, should have it.

That this is true; that if there be a contingency in the devise, it being performed in John, all the remainders are void, the Rector of Chedington's case is to our purpose, 1 Co. 156. A lease was made by Robert to Elizabeth Elderker, for eighty years, if she so long lived; and if she died within the said term of eighty years, then he leased the premises for so many years as should remain after the death of Elizabeth, to Ralph, for the residue of the said term; with like grant, if Ralph died within the term, to William, for the residue of the said term of eighty years, if he so long lived; and if he died within the term, then he granted the premises, for so many years of the said eighty years as then should remain unexpired, to Thomas, his executor, and assigns. It was adjudged that the estate to Thomas was upon two contingencies; first, Ralph could not take unless Elizabeth died within the term, and William could not take, unless Ralph died within the term, that is, before Elizabeth; for the term determined by her death. And Thomas could not take, unless William died in the life of Elizabeth; *viz. infra terminum prædictum.* And both Ralph and William survived her; and therefore Thomas, who was not to take if Ralph or William survived, could not take at all.

M. 18 Jac. 2 Cr. 591. B. R. Pell and Browne, William Browne, having William, Thomas and Richard, devised to Thomas, his second son, paying 20*l.* to Richard, at the age of twenty-one years; and if Thomas died without issue, living William, that then William should have the land, to him, and

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his heirs and assigns for ever. It was adjudged, Thomas had a fee; and that the clause, *if he died without issue*, is not absolute and indefinite, *whensoever* he died without issue; but it is with a contingency, if *he died without issue, living William;* for he might survive William, or have issue alive at the time of his death; in which cases William should never have it, but is only to have it if Thomas died without issue, living William; and the books, 3 M. 124. and 19 Eliz. 354. were cited, to warrant it; and this is also agreed in Chadock's case, 2 Cr. 695.

And the true difference is put in Boraston's case, 3 Co. 20. When the words *when* and *then* refer to a thing which of necessity ought to happen, there they make no contingency, although they are adverbs of time; as there it was, *when Hugh Boraston shall or may accomplish his age of twenty-one years.* In our case it may happen that William may die before Elizabeth, or William may survive Elizabeth: both cannot happen; and so John may die before Elizabeth and William, or may survive them. And, therefore, the estate to the heir male being limited to take effect if William be dead in the life of Elizabeth, and not otherwise, is contingent not only as to the person, but as to the estate, whether it shall take effect or not: and John's depends upon that; and is also contingent in estate (admitting still, for I argue all this upon suppositions, that the heir may take by way of remainder, and as a purchaser, and not by way of limitation). And in this there is a great difference between a contingency as to the person, and a contingency as to the estate. If a devise or grant be to one for life, remainder to his first, second, third, &c. sons, &c. remainder to J.S.; that to J. S. takes effect, and the contingent estates in respect of the person may afterwards arise and interpose. [So if land be limited by a proper deed to William for life, by express words, remainder to the first heir male of his body, and the heirs males of the body of that heir male, remainder to John, I make no question but the present estates to William and to John are executed; and the contingent estate, when it shall happen, shall interpose.] Peradventure so it may also, in case where the contingency of estate is annexed to a particular estate, and not to the remainder subsequent. But where the contingency is in the estate, and in nature of a condition precedent, whatsoever depends upon that is contingent also. In our case the heir male of the body of William (if the words must be taken as words of purchase) cannot take if William survive his mother; John cannot take unless he survive mother and brother; and the *estate* (*f*) of his issue depends upon all these contin-

(*f*) The word *estate* is substituted by the Editor for the word "*that.*"

gencies. [It is not limited by the will to the heir male of the body of William, or to the heirs male of the body of John, as an immediate remainder: but it is limited to William, if he be then living; if he be dead, that is, *then* dead, to the heir male of his body; and in like manner to John if he be dead, that is, *then* dead, to the heir male of his body.]

In Napper and Sander's case, adj: Hen. 7. Car. C. B. Hutt. 118. a feoffment was made to the use of Margaret Sanders for life, and after to the use of the feoffees for eighty-nine years, if Nicholas Sanders and Elizabeth his wife should so long live; and if Elizabeth survived Nicholas, then to the use of Elizabeth for life; and after the decease of Elizabeth, then to the use of Posthumus in tail, with remainder over. It was adjudged that the estate limited to Elizabeth if she survived her husband was contingent, but not the remainders. And the reason was, because the contingency, or condition precedent was annexed only to Elizabeth's estate. The other estate to Posthumus was to take effect after the deaths of Nicholas and Elizabeth; and, therefore, Elizabeth's estate (upon the contingency happened) might interpose. It was limited to Posthumus after the death of Elizabeth, and not if she died before Nicholas, nor if she survived Nicholas; for then the other remainders had been also contingent.

[And Beck's case, P. 10, C. B. R. 1 Car. 363. was in effect this. A conveyance was to the use of James Beck the grandfather, for life, and after to James Beck the second son for life, remainder to the use of the first son of James the son, which should have issue male of his body, and to his heirs for ever; remainder to the use of his first daughter, which should have issue of her body, and her heirs for ever; and for default of such issue, remainder to the right heirs of James Beck the son for ever. It was adjudged the estate to the first son of James the son was contingent; and that a remainder to the right heirs vested in James the son. And though James the son had a son, who died before him without issue, yet his fine was no forfeiture to the heir at law.]

But in our case take the words *heir male* to be words of purchase, it is as a contingent, or condition precedent annexed to the remainders; the heir male of William or John were not to take, if William or John survived the mother.

Acton and Hord's case, 36 Eliz., cited in Lovie's case, 10 Co. 85. A fine was levied to the use of A., and the heirs males of his body, till he or the heirs male of his body had done such a thing; and after such a thing done, to the use of another in tail; and A. dies without issue, without doing the thing, the remainder which was contingent never took effect. And the

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case 5 E. 3. 27. there cited, William leased to John, for the life of John, rendering rent to William, for the life of William; and after the death of William, to John and his heirs; this is a contingent till the death of William. If William die before John, it is a good remainder: but if John die before William, it is naught. So that in one case by that expression which is made, that the heir male of William and the heir male of John take as purchasers, it follows, that they cannot take but upon a supposition or contingent precedent, that is, if William die before Elizabeth then, and not otherwise, his heir male takes; and so if William and John die before Elizabeth, then John's heir male takes, and not otherwise, and these contingencies not happening, all the subsequent remainders must be void.

A third absurdity, or unreasonableness, which would arise upon that exposition is this:—By a grant, or deed, in law, in like words as the devise is here, admit William or John had sons. The eldest of these sons being next heir male must have taken to him and to the heirs males of his body, and no others; and for default of such issue the second, or other sons should not have had it, but it should have gone over to the other brothers in remainder; which is (as it is said of Jacob and Esau, Rom. ix.) the children being not yet born, neither having done any good or evil, it was written, Jacob have I loved, but Esau have I hated; and so they should be *damnati ante quod nati.* He that should make such a grant would be accounted an unreasonable man, and yet the grant shall be good. But wills are made commonly by men *in extremis;* and being *inopes consilii*, the law will help and assist them; and not judge, if any other exposition can be made, that a man who is in his death bed will wilfully, and without cause, disinherit an infant who never offended, or pick and choose, and take one, and leave out another of the same stock, and his own heir, when there was neither offence given by the child, or his ancestor.

Construction of wills to be favourable to the words.

So that these absurdities will follow upon literal and legal exposition: first, if William or John outlive the mother, all the remainders, contrary to the express intent of the testator, would be void; and William or John having the estate by the will, be it what estate it would be, that also would drown in the fee descended to him. Secondly, that if William or John should die, and leave sons, all the first are excluded, and it would leap over to those of more remote kindred. Thirdly, if William or John died leaving his wife with child of a son, even that son also must be disinherited, the son not being *in esse* when the contingency happened. All which

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absurdities are avoided by the exposition of the words heir male to be the same with heirs male, and so to be words of limitation.

It hath been objected that all the sons have an estate tail (except Thomas) by the will by implication of those words *and for default of such issue;* so that John hath not but for default of issue of William; and Vincent for default of issue of John; and Thomas for default of issue of Vincent. But in the case of Thomas the devise runs thus:—*To Thomas, if he be then living; and if Thomas be dead, then to the next heir male of the body of Thomas, and the heirs males of his body for ever;* but no limitation over, *and for default of such issue,* which follows after the other devises: and, therefore, that Thomas had no estate tail, but an estate for life; and all the rest are good entails by the will; and Thomas, having but for life, shall not prejudice the remainder or reversion in fee descended to the daughters of John.

To this I answer, that the words, *for default of such issue,* cannot literally extend to the issue of John, or Vincent; for the limitation is, *to the next heir male of the body of John, and to the heirs males of his body, and for default of such issue to Vincent. Such issue*—what issue? Why issue of the next heir male of the body of John; that is the last antecedent; and there is no colour to extend it to the issue of John. Some more colour might have been had it been *for default of issue* generally, *to remain to Vincent;* but being *for default of* such *issue,* the *such,* the *talis,* must have a *qualis;* such issue as he had last before spoken of; which was the issue not of John, but of the heir male of the body of John. If lands be granted to A. for life, remainder to his first son, and the heirs males of his body; and for default of such issue, to B.; it is clear that *such issue* goes not to the issue of A., but to the issue of his first son; and, therefore, if the first son's issue fail, it shall go to B., and not to the other sons of A.: this is so clear and manifest, as that it needs no further probation, as I conceive, and therefore there is no difference between the limitation to Thomas, and the limitation to his brethren. But the absurdities will still remain upon a literal construction of the words, which I formerly mentioned: *viz.* that the estate shall leap and skip over from the eldest son of John to the brother, excluding all other the sons of John; and so it must be in the case of Vincent and Thomas, and that if John survive the mother, all other the limitations are void; and, therefore, to avoid all these absurdities, and to make a congruity of all the parts of the will, the one to the other, and to his intent, I conceive it ought to be construed, that he did devise the lands to Elizabeth

If lands be granted to A. for life, remainder to his first son, and the heirs males of his body; and for default of his issue to B.; it is clear that *such* issue, goes not to the issue of A., but to the issue of his first son; and, therefore, if the first son's issue fail, it shall go to B., and not to the other sons of A.

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for life, remainder to William and the heirs males of his body, remainder to John and the heirs males of his body, and so to the rest of the brethren.

And therefore, thirdly, I conceive the very words of the devise itself, taken in that latitude which we allow in construction of wills, without wresting or offering violence unto them, will bear this interpretation: (g) for, first, when he deviseth to Elizabeth for life, and after her death to William, if he be then living, or if he be dead, then to the next heir male of the body of William, and the heirs males of his body, with remainders over, this may be well construed not to import a contingency; for William would have had the lands if no such expression had been; he was heir at law, and *expressio eorum quæ tacitè insunt nihil operatur:* but indeed that reason reacheth not to John; for William might have left daughters. But, secondly, words of *then* and *when* in wills are often taken *expletivè*, as it is said in Boraston's case.

Words of "then" and "when" in wills are often taken *expletivè*.

In lands there is to be considered *et res, et modus habendi*, the land, and the several degrees, as it is termed in Throckmorton and Tracy's case, (*h*) of having it. The lands is the substance, and possession is one degree, reversion or remainder another, another degree of having or enjoying it. William or John could not have a possession in the life of Elizabeth: but he might have a reversion, and when Elizabeth died, then the possession; so that the words of devise to William, if William be then living, may be construed to extend to the possession; that is, that having a reversion, he shall enjoy it, then in possession, if he be living; if he be dead, his issue shall enjoy it; and agreeable to this construction is the very principal case of Throckmorton and Tracy, where there is a grant of the reversion, *habendum* the lands from the death of I. S., for thirty-one years.

Spalding's case P. 6 Car. 1 Cr. 185, which hath been cited was:—he having three sons, John, Thomas, and William, devised to John, his eldest son, the land in question, to him and the heirs of his body in fee after the death of Alice, the devisor's wife; and if John died, living Alice, (he did not say if John died without issue, living Alice,) that William shall be his heir. He devised other lands to Thomas in tail, and if he died without issue, that John should be his heir; and devised other lands to William, his third son, and the heirs of his

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(g) Obj. The words are "remain, descend, and come." Resp°. So, when it is to W., remainder to the heir of his body, or heir male of his body, 5 E. 4. 2. cited by my brother Browne.—Note in the manuscript.

(*h*) Plowden. Comm.

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body; and if all his sons should die without heirs of their bodies, then the lands should go to the children of his brother. John dies in the lifetime of Alice, his mother, leaving a son; and it was adjudged that he should have it, and that the words, *if John died living Alice*, shall be construed, if John died without a son living Alice. The reason is, as I conceive, the law will not construe it that the testator intended contingencies (which are as metaphysical notions) to disinherit an heir; that is the true reason; the words, *if all the sons die without issue, then to his brother's children*, would not supply it. These words, indeed, might give an estate tail after failure of the sons before the brethren, but not between John and his brethren. So here the words, *if William be then living*, shall not be understood to make a contingent limitation; and to make the devisor a lawyer, to intend the metaphysical learning of contingencies; but plainly, that the possession shall come to William or John if then living, if dead, to his son, or heir male. And the same reason which makes us to construe that there shall be no contingency in the estate, though the words sound in contingency, "*if William be then living*," (*i*) *in possession*,—*warrant* the construction that the words, *heir male*, shall be construed as words of limitation, and not as designing a contingency in the person. The testator, I say, knew not these metaphysical notions, but plainly that the possession after the death or marriage of Elizabeth should come to William if he were then living; if not, to his next heir male.

The law will not make construction that a testator intended *contingencies* to disinherit an heir.

And then the case will be no more than this: he deviseth to Elizabeth for life, remainder to William and the next heir male of the body: this I take to be an estate tail in William; for the word *heir* being a word of limitation in this place, shall be taken *collective*, agreeably with the cases put before out of the register, and 39 Ass. and in 5 Car. C. B. H. 299, Thomas and Kemey's case, (*k*) limitation in use *al Edward Kemeys et heir male de son corps, en le singular nomber, fuit tenus un estate tail.* It may be objected, that there it was barely words of limitation, but here it sounds by way of remainder. But it was adjudged in a stronger case, P. 1651.

MSS. Hill. 14 Car. 1. 286—306. S. C. Vid. 1 Roll. Ab. 26. pl. 4. 2—253. pl. 4; —794. pl. 6; Stile 249—273. Cory MS. Rep. 351. Comyn Rep. 294, cited. MS. Rep. of 1654. 19. (*l*)

(*i*) After the word "living" there is a blank in the manuscript, and "possession" is supplied in a recent hand, No. 3. The whole passage is confused; and the Editor has altered the brackets, and added the word "warrant."

(*k*) Vin. Abr. 8. p. 48. tit. Devise D. pl. 10, 11, 12.

(*l*) Note in handwriting No. 3, or Mr. Umfreville's, and the first cited book "14 Car. 1. 286. 306," is now No. 42, of the Harg. collection. Cory's MS. is now No. 23, of the same collection.

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B. R. Bawsey or Pawsey and Lonsdale. *I give my lands to my son Richard during his life, and after to the heir of his body for ever.* Adjudged Richard had an estate of inheritance; and yet it was limited to him expressly for life. And so in Sharp and Musgrave's case, (*m*) C. B. 1657, *a copyholder who had surrendered to the use of his will, devised to Robert for life, and after his decease to the heir of his body for ever upon a condition.* It was agreed, Robert had an estate of inheritance *a fortiori* here, where it was limited to John and the rest, generally, without limiting it for life.

Cited in Alford's case, in these Reports.

Agreeably to these cases was Busby Mansell's case (*n*) in the Exchequer. A man having a long term devised it to A. for life, remainder to the heirs of his body, with remainder over. It was much urged the heirs in case of a chattel took as a purchaser: but because they were words of limitation in their own nature, and it vested in no person *in esse*, the Judges would construe it as an estate to A., and the heirs of his body, and would not admit it as a limitation in contingency; and yet there were words in remainder, and being of a term, the word *heir*, or *heirs*, is allowed. And the word *next* alters not the case; to the *heir male*, and *next heir male*, is all one; for he that is heir male is next heir male. If the words had been, *first heir male*, it might have had some influence, but to go no further:—but *next* is no more than *when*; the law implies, and *it* (*o*) may well also be construed *next, successivè et pro tempore.*

It is objected in these cases there was no remainder limited over: but here the words go farther, to the *next heir male of his body*, and *the heirs males of his body.* To this I answer; that in a will these are but words of redundancy, and declaratory, as in Shelly's case; a conveyance to the use of the heirs males of the body of Edward Shelly, and the heirs males of their bodies; these words are but redundant, and make not the heirs males in the first place to be purchasers; and yet the words heirs males may be words of purchase, as well as heir male in the singular number. But the reason in that case was, if the first words were words of purchase, then all the issues males of the body of Edward Shelly but the first he excluded to take by the limitation; which reason holds strong in this case of a will.

The reason of Shelly's case.

Archer's case considered.

It is true in Archer's case, (*p*) there was an express de-

(*m*) This case is called Scarpe *v.* Goderd in a manuscript report, No. 42, Harg. MSS, pl. 308. where it is said by Mr. Umfreville not to have been decided.

(*n*) 3 Danvers 186. pl. 2.

(*o*) *It* supplied here.

(*p*) The record there is to the right and next heir of Robert, and the heirs of his body. *Nota*, It is not *heir* male of his body, but *heirs* male.—Note in the manuscript.

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vise to Robert for life, and after to the next heir male of Robert, and to the heirs males of the body of such next heir male. It was adjudged he had an estate but for life, and the next heir male took as purchaser; but their being expressly "*for life*" in the very will, there is less cause by construction to give him an estate tail. Secondly, It was not to the heir male of Robert, nor heir male of the body of Robert, and so differing from the words subsequent of limitation which will alter the case, as I shall shew by and bye. But here it is limited to William, and so to John after the death of Elizabeth, generally, without shewing what estate; and, therefore, may admit that construction that William should have an entail.

But for that case of Archer, I will not raise up again the question from the grave: but I must say, first, that the other point of contingency, that the remainder might be destroyed, being unanimously resolved, went to the end of the case; so that the resolution of this was *ex abundanti*, and more than needed; and, secondly, It appears by the verdict, that Robert was son and heir to the testator; and, therefore, the estate for life limited to him before a son born must determine, it being incompatible that the fee simple in him, and the estate for life without any estate actually to interpose, should stand together.

In Lewis Bowle's case, 11 Co. 79, upon a feoffment or covenant to stand seized to the use of A. for life, remainder to his first and other sons in tail, remainder to the heirs of the body of A.; there is an estate arises when the contingency happens, to set up and feed the contingent use. But there is none such in case of a will. So that this point in that case was passed over to introduce the opinion of the Court in the greater points of destroying a contingency by feoffment, and of a warranty descending to bar it.

And in truth, the case itself varies in the record of the verdict in some things from it, as it is recited in the case; for the words of the will as they are found by the verdict are "to Robert for life, and after his death wholly to remain to the right and next heir of Robert, and to the heirs of his body [and so is the case itself, as it is reported 3 Cr. 453.] In the case it is, to the next heir male of Robert, and to the heirs males of the body of such next heir male. But be it one, or the other, it is not the next heir or heir male of the body of Robert, but to the next heir or heir male of Robert, and heirs males of his body; and, therefore, hath more ground to make him a purchaser, because the words whereby he should take as a purchaser differ from the limitation after, and are not of the same kind. The heir male or heir of Robert ex-

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tended to the collateral line; so did not the words of limitation; and, therefore, may well be understood to be of a differing kind. But in our case the words heir male of the body of William, or John, and the heirs males of his body, are both of one kind; and the latter words vary not in the limitation.

Till Shelly's case, it was long debated, whether, when an estate was limited to a man for life, remainder to the heirs males of his body, whether the heir did not take as a purchaser.

Thirdly, the time of the will in Archer's case, and of this will, are to be considered. This will was made 8th September, 39 Eliz. 1597.; and Archer's case was in the same year. That case and Shelly's case came in print three or four years after; and, till Shelly's case, it was long debated, whether where an estate was limited to a man for life, remainder to the heirs males of his body, whether the heir did not take as a purchaser. And, therefore, even in that case, they did not rest in limiting it to the heirs males of the body of Shelly, but to the heirs males of the body of those heirs males; and that may be the reason why it was so limited, both in this and that will. But as it was adjudged in the case of Shelly to be superfluous, so shall it be here. If the word *heir* be taken *collectivè* for *heirs*, it is no more than a devise after the death of Elizabeth to William, and the heirs males of his body, and the heirs males of the body of such heirs males; with like remainders to John and the heirs males of his body; and so all parts of the will agree.

[P. 36 Eliz. 3 Cr. 96. Smith and Hawes. The grandfather devised to the father for life, remainder to the son and the heirs males of his body, remainder to the right heirs of the devisor, and the heirs males of his body begotten. The grandfather, (the devisor) and the father die; the son had issue a daughter. It was adjudged she had a fee simple, notwithstanding his intent was apparent that his right heirs should have an estate tail; for the fee vested in the father by the death of the devisor, and cannot by matter subsequent be turned into an estate tail.]

Sunday's case, 9 Rep. which I have before cited in part, proves this exposition. He devises, if his son Samuel, to whom he had before devised it, have no issue male, then his son Thomas to have it. If Thomas marry, having a male issue, then his son to have it; and if he have no male issue, then Richard to have it. There the estate was to Thomas generally, and after to his son, which is much more particular than the word next heir male in our case; yet, *ad evitandum absurditatem*, the law will construe his meaning by the subsequent words, that his issue male shall have it, so that no estate goes to the son of Thomas by the word son; for that would exclude other sons; but an estate tail settles in Thomas himself. And so by analogy of reason in our case, the heir male and heirs

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males of the body of the heir male, shall extend to the heirs males of the body of William.

I do not deny, this is not the clear literal interpretation of the words: but it is enough if the words will bear this interpretation, the other parts of the will manifesting this to be his intention, and thereby avoiding, not only contradictions, but absurdities, which would arise upon another interpretation. But whether this interpretation of these devising words shall stand or not, yet his general intent upon the whole will appearing, that the heirs male of the body of William, the devisor, shall have it, by express and pregnant words in the will, subsequent to this. That part of the will shall be taken to be in force, which is last in the will, and agrees with that general intent, rather than the other part; for the last words in a will, and the first in the deed, shall stand in force.

The clear literal interpretation of words may be departed from if they will bear another sound interpretation, where the other parts of a will manifest the latter intention; and absurdities and contradictions, may thus be avoided.

That part of a will shall be taken to be in force, which is last in the will, and agrees with the general intent. The last words in a will, and the first in a deed, shall stand in force.

So that I conclude, that the *general intent* of the devisor in the will was, That the lands should go to his sons, and the heirs males of their bodies successively in remainder. And I deduce it,—

First, from that which is apparent in both clauses of his will, that he intended his goods and land should go together.

Secondly, That it is manifest his goods, by the words and intent of the will, are to go to the heirs males of his body, and consequently his lands ought to go so also.

Thirdly, From the absurdities and unreasonable consequences of another construction; First, that if any of the sons outlive the mother, all the remainders would be void, contrary to his express intent. Secondly, That if William or John should have two or more sons, all should be disinherited but the eldest, and the estate skip over them to another brother, and in like manner from one brother to another brother. Nay, if William or John's wife were *enseint* at the time, and the child born after Elizabeth's death, it should not take.

And, lastly, from the devising words themselves, which, in a reasonable and fair construction, such as we allow in wills, though not necessarily, yet *evitandam absurditatem* be fairly and without violence extended to the sense of devising the lands to his sons, and the heirs males of their bodies in remainder one after another, [whereas to introduce that sense which is put upon the words by my brother of the contrary opinion, and which confessedly carries with it these unreasonable consequences and absurdities, you offer greater violence to the words; for whereas the words are, *to William, if he be then living, and if he be dead, to the next heir male of his body*, you put in the words, *for life*, and make it to William for life;

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and you put out the words, *if he be then living*, and *if he be dead*, which words literally sound in contingency and make it to William for life, remainder to the next heir of his body, and the heirs males of his body.]

For authorities in point, I can cite none. I remember what Justice Jones said, in Daniel and Ubly's (*q*) case :—"a case upon a will has no brother, and therefore authorities in point in such cases cannot be expected." But these cases which (as cousin german) by analogy of reason agree with ours, as Sundays and Spaldings, I have cited, as they came in my way, and lay no further weight upon them.

I conclude that judgment ought to be given for the defendant, who claims under the recovery suffered by Thomas, who, as I have argued, was tenant in tail.

(*q*) Latch, and the contemporary reporters, 3 Car. 1.

BECKMAN *v.* MAPLESDEN. (*a*)

Tr. 10 Car. 2. Rot. 1746.

[The law requires the same measures (*b*) for the same kind of commodities. The King's standard, or *wine* standard, is not the rule for all commodities; except by analogy and proportion. The constant universal practice of the country, taken notice of and approved by the statutes themselves, has allowed different measures, according to the different natures of the things to be measured.

In an action of trover and conversion for taking away certain pots, and thirty pounds weight of pewter pot metal, the special verdict finds that the plaintiff was possessed of the pots in the declaration, and so finds the special matter touching them; but they say nothing as to the thirty pounds weight of pewter pot metal, neither finding the plaintiff possessed or not possessed; or the defendant guilty or not guilty of the conversion. This omission vitiates the verdict, although the conclusion is special; inasmuch as the conclusion is grounded on the special matter which extends not to the metal. And this is not holpen by the statute of 32 H. 8. c. 30. of Jeofayles. That statute, after issue tried, aids negligence or default of the parties, their counsel or attornies; but not the verdict or fault of the jurors.]

(*a*) A note of the argument of counsel in this case, is in No. 3781, of the Ayscough MSS. in the British Museum. It was decided in Michaelmas term, 14 Car. II. Harg. MSS. No. 55. fol. 139, and No. 57, fol. 201. The defendant was Mayor of Maidstone in 1658—1659.

(*b*) See a short note on the late discussions upon an uniformity of weights and measures in Appendix D.

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BECKMAN *v.* MAPLESDEN.

Harg. MSS. No. 55. fol. 139. No. 57. fol. 202.

An action of trover and conversion is brought against Gervase Maplesden by Gabriel Beckman, for one pewter gallon pot, one pewter quart pot, one pewter pottle pot, one pewter pint pot, 30 lb. weight of pewter pot metal, and 30 lb. weight of other pewter metal called lay, to the value of 100*s.* *ad damnum* 10*l.*

Upon not guilty pleaded, a special verdict is found:—

That, 28th October, 1659, the plaintiff at Maidstone was possessed of the several pots in the declaration; and that the defendant, the same day and year, was mayor of the town and parish of Maidstone, and clerk of the market there; and that at the court of the clerk of the market held there for the said town and parish, the said 28th day of October, before the said defendant then mayor, the jury, then sworn to enquire of the defects of weights and measures, did present that certain pewter measures, *viz.* a measure called a gallon pot, another measure called a pottle pot, another measure called a quart pot, and another measure called a pint pot, being the measures of the plaintiff, and by him used commonly in the sale of distilled waters, were severally defective in measure, and not according to the standard. And the jury, upon the special verdict, do further find, that at the said court of the clerk of the market for the said parish and town of Maidstone, the said 28th day of October, 1659, the said pots were tried in the said court of the clerk of the market, and there found to contain less than the standard by virtue of the statute delivered out of the records of the Exchequer, and kept in the town of Maidstone aforesaid for the whole county of Kent; and that, thereupon, the defendant being then mayor of the said town of Maidstone, in the said court of clerk of the market, did seize the said pots as forfeited, and did break the said pots, and destroy them, according to the form of the statute 11 H. 7., in such case made and provided.

No mention of pewter metal. (*c*)

Not found that they were the same pots as in the declaration. (*c*)

Not found how, or by whom tried; nor do the Jury find it so, but only that they were of the bigness of wine measure. (*c*)

And they further find, that the said pots were of the bigness of the several measures used for the sale of wine, and were worth 30*s.* But whether the standard measure for retailing wine, and the standard measure for retailing ale, are and of right ought to be one and the same measures, or diverse, the jury know not; and therefore pray the advice and consideration

(*c*) Notes in the margin of the manuscript.

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BUCKMAN v. MARLBOROUGH.

of the Court; and if the Court shall think that the standard measures for retailing wine, and the standard measures for retailing ale, are not, nor of right ought to be, one and the same measures, but diverse, then they find that the defendant is guilty; and assess for damages 30*s.* and for costs 40*s.* And if the Court shall be of opinion that the standard measures for retailing wine, and the standard measures for retailing ale, are, and of right ought to be, one and the same measures, and not diverse, then they find the defendant not guilty.

In this case there are two things to be considered: the matter in law intended by this verdict, and the sufficiency or insufficiency of the verdict itself.

As to the bringing in question of this matter in law; the matter in law is but this, whether by the law the measures, that is to say, gallons, pottles, quarts, and pints, by which wine is by law to be sold, ought to be of the same content and bigness as the gallons, pottles, quarts, and pints, by which ale is to be sold. But to usher in this question two things are to be supposed as implied in the verdict: the one, that distilled waters are to be sold by retail by the same measures by which wine is to be retailed; and this I take to be supplied well enough by reason of the conclusion of the special verdict; for that all things necessary to it are to be intended and supplied, but that whereof the doubt is. The second is this, that the law supposes there is a standard measure or standard measures for wine and ale; for so the question upon the verdict is: whether the standard measures for retailing of wine, and of ale, are, and of right ought to be, the same measures.

To begin then with the matter in law: the question is, whether the standard measures for retailing of wine and ale, *viz.* the gallons, pottles, quarts, and pints, ought to be the same as the verdict is found. It is whether the standard measures for retailing wine and ale are, and ought to be, the same. The first property is *quæstio facti*, whether they are the same. The second is *quæstio juris*, whether they ought to be the same: and *ad questionem facti non respondent judices*. But as this case is, I think the conclusion of the jury is the special verdict to be well enough; for the question is not purely, whether the measures for retailing wine and ale are the same, though perhaps also they may be well enough; but whether the *standard* measures for retailing, &c. are the same.

Now the words "standard measure," I conceive, have a double sense; properly they signify a particular measure appointed by law according to which other measures are made,

and according to the proportion and contents whereof such things are to be sold by measure. Of these it appears there were two sorts, the King's standard measures, which were anciently kept in the Exchequer, or the Treasury, as appears by the statute 12 H. 7. c. 5. By that statute it also appears, that the same standard measure, as to the gallon and bushel, (which alone are provided for by the statute 11 and 12 H. 7.) were not right, but misguided the King and Parliament in the measures made by the act of the 12 H. 7.; [and no wonder, for the denarius, the English penny, by the said old statutes of H. 3. and E. 1. was the foundation of our measures; which denarius then was, and so it was in king Ethelred's time, the twentieth part of the Troy ounce. Under Ed. 3. it came to be diminished to the twenty-sixth part. Under H. 6. to the thirty-second part. In Edward the Fourth's time to the fortieth part; and so it continued at the time of the making that stat. 11 H. 7., as is observed by Mr. Graves in his Denarius, fol. 116, 117; and appears by the old statutes 9 E. 3., 2 H. 6. c. 13., and other statutes; and now sixty-two go to an ounce. But be it for that, or for what other reason, it appears the standard of 11 H. 7. was not (*e*) right.] The King did make, or at least enact to be made, a new standard of a bushel, and a gallon, to remain in his treasury for ever; and did cause the former measures to be destroyed. Besides the King's standard measures, there were other measures called standard measures, which were made and allowed in particular cities, and other places, agreeing with the content of the King's standard in the Exchequer, as common measures; these, by the statutes of 11 H. 7. and 12 H. 7., were made of brass, and sized according to the bushel, and gallon, so now made for the Exchequer; and marked with the letter H., and a crown; and these are also called the King's standard for weights and measures, by the statute 11 H. 7.; and according to these, by that statute there is power given to make, sign, and print like weights and measures to others requiring the same.

1663. BRETMAN v. MAPLESDEN. Though I find since many of them have been removed into the Tower. (*d*)

In the second sense of these words, standard measures, I conceive there is not meant any particular, single, individual measures, but the content, a rule agreeable to which all measures are to be made; the assize, proportion, or analogy, whereunto

(*d*) Note in the handwriting of the original manuscript.

(*e*) In the edition of the Treatise of Greaves on the Denarius, in his works by Birch, 1737, he goes on to say, "Under H. 8. (stat. 36 H. 8.) at first it was the fortieth, then the forty-fifth, afterwards sixty pence was coined out of the ounce in the second year of queen Elizabeth, and during her reign sixty-two." See Appendix K, for a remarkable note on our ancient weights and measures preserved in the Cotton library.

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all such kind of things as are properly to be measured, are to be measured. As when the statute says *sit una mensura per totam Angliam*, it cannot be understood of the mechanical part, the instrument which we call the bushel, gallon, or measure; one such measure cannot serve for all England: but it is to be understood of the rule, the content or proportion of the bushel, gallon, or other measure, by which things are to be measured; and according to which proportion all the measures of the bushels, gallons, or the like, which are the mechanical parts of the vessels which we use in measuring, are to be made.

And in that sense the standard measures are the contents or quantity of those measures which the law hath appointed and allowed. In this sense the standard measure, I take it, is that which is in the statute, 31 E. 1. (*f*) *ordinatio pro mensuris*, (in some books it is printed among the statutes made 18 E. 2.) *viz.* "An English penny, which is called the sterling, round without clipping, shall weigh thirty-two grains of wheat well dried, and gathered out of the middle of the ear; and twenty pence make one ounce; and twelve ounces one pound; and eight pounds make a gallon of wine, and eight gallons of winem ake a bushel of London, which is the eighth part of a quarter." Which statute is but an affirmance of the law before that time, [as appears expressly by the statute, 51 H. 3. intituled, *Assisa panis et cerevisiæ* (*g*), which is in the very same words as the *ordinatio pro mensuris*, 31 E. 3. And there it is said to have been the assise in the time of the progenitors of King Henry III. and is exemplified by Hen. III. at the request of the bakers of Coventry.] The standard measure remaining in the Exchequer, varying from this rule or ordinance of 51 H. III. and 31 E. I., the statute 12 H. VII. c. 5. reserves this assize; and enacts, "That the measure of a bushel contain eight gallons of wheat, and that every gallon contain eight pounds of wheat of troy weight, and every pound contain twelve ounces of troy weight, and every ounce contain twenty sterlings, and every sterling be of the weight of thirty-two corns of wheat, which grow in the midst of the ear of wheat, according to the old law of this land."

So that in this sense I conceive the standard measure is that assize or rule which the law allows for bushels, gallons, and other measures. In this latter sense, I conceive

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(*f*) In the edition of the statutes lately printed by authority of Parliament, it is not entered either as 31 E. 1. or 18 E. 2. but in Vol. I, p. 204. under the title of *Assisa de Ponderibus et Mensuris*, amongst the statutes of uncertain date.

(*g*) In the parliamentary edition of the Statutes, this is printed among the Statutes of uncertain date, Vol. I. p. 199.

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the question put by the jurors, whether the standard measure for retailing wine and ale are the same, is to be intended; for that, in the other sense, the question, whether there be two sorts of standard measures for wine and ale in the treasury, or whether two sorts of standard measures for wine and ale, at Maidstone, or other the places appointed for standard measures,—this is not to be determined by the Court; but is an enquiry of fact: though I shall have occasion to say something concerning the several standards in this sense also. But the question, or doubt, of the jury is to be taken in this other sense; that is, whether the rule or canon for the proportion, or assize measure of wine and ale, are and ought to be the same. In this sense it signifies the same thing to say, the standard measure for wine and ale *is* thus, and the standard measure for wine and ale *ought to be* thus. The question is wholly *de canone* of the rule or law by which such things as wine and ale are to be measured.

So that the conclusion of the jury as to this matter being well enough, I come to the point of law intended by the verdict,—*whether by law the measures by which ale or beer are to be retailed ought to be of one content or bigness; and the measures by which wine or distilled waters are to be retailed ought to be of another, that is, a lesser content.* And I conceive the ale or beer gallon, pottle, quart, and pint, are by law greater than the wine gallon, pottle, quart, and pint.

The principal argument that hath been insisted on against this opinion is, that *Magna Charta*, c. 25. and the stat. 16 Car. c. 19. and generally all the statutes concerning measures, do enact, "That there ought to be but one measure *per totam Angliam*." The statute of 16 Car. is, "That from thenceforth there shall be but one weight, one measure, and one yard, according to the standard of the Exchequer, throughout all the realm, as well in places privileged as without, any usage or custom to the contrary notwithstanding;" and some other of the statutes also have negative words; and divers cases have been put, that no custom can prevail against a negative statute. And hence it is inferred that the measures for ale and wine, that is, the gallon for ale, and the gallon for wine, and so the pottle, quart, and pint, are to be the same; for else it is not "*una mensura per totam Angliam.*" [To strengthen this opinion, there may be added several authorities, though not mentioned at the bar; Crompton's Justice of Peace, fol. 84 (*f*), in these words, "*Nota, que Popham, Chief Justice, dit, que le measure de vin et ale serra tout un,*

(*f*) 94 b.

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et que issint ad etre agree per les Justices, viz. accordant al standard del Exchequer." And it is very true there was such a resolution of all the Judges, in the year 1583, concerning Salisbury; a copy of which resolution, extracted out of this Register at Salisbury, I must own with many thanks, to have received from my brother Hyde, Recorder there. It is this :— "*Primo Maii*, at the Star Chamber, 1583. In a controversy grown between the mayor of the city of New Sarum, in the county of Wilts, and one Robert Holmes, vintner, and other vintners of that city, concerning measures for wine by the said vintners of late altered, and used within the said city, and drawn to a less content than by the laws of this realm they ought to be. Out of which controversy there grew these questions following :—

1st, Whether any measure by the laws of the realm ought to be used within the same city, which should not first be viewed and allowed by the mayor of the said city for the time being.

2dly, Whether the measures for wine and ale ought to be all one for the content, and not divers, by the laws of the realm; and ought to be sold by the content of the measure, and not by weight.

And, 3dly, Whether any wine or ale ought to be sold by any measure other thau such as is to be warranted and doth agree with the standard of her Majesty's Exchequer.

All which questions by the practice and device of the said vintners being made very doubtful, it pleased the Lords of the Council to commit them to the decision of the two Chief Justices and Judges of the realm, and the rest of her Majesty's learned counsel, who, by letters, were required to examine the controversy, and to certify their opinion thereof, and of the said questions, according to the true sense and construction of the law. By virtue whereof they have assembled themselves together; and deliberately and at large heard the allegations, objections, and answers, of the parties by their learned counsel propounded and debated on both sides. This day their opinions and judgments upon the said controversies and questions were delivered, and reported to the Lords and others of the Privy Council, in the Star Chamber, by Sir Christopher Wray, Knight, Lord Chief Justice of her Majesty's Bench, and Sir Edmond Anderson, Knight, Lord Chief Justice of the Common Pleas, as well for themselves as for the residue of the said justices, judges, and learned counsel, as followeth :—

1st, That no measures ought, by the laws of the realm, to be used within the said city, except the same were first

viewed and allowed by the mayor of the same city for the time being.

2dly, That the measure for wine and ale is and ought to be all one for the content of the measure, and not divers; and to be sold by the content of the measure, and not by weight, as by the said Holmes and the vintners was frivolously pretended.

And, 3dly, That neither wine nor ale ought to be sold by any measure other than such as is to be warranted, and doth agree with the standard in her Majesty's Exchequer (*g*)."

But notwithstanding all this, I hope I shall give satisfaction to others, as I have to myself, that this opinion is mistaken, is grounded upon a wrong exposition of these words, *Sit una mensura et unum pondus per totam Angliam.*]

I conceive the words have another exposition and meaning: —"There shall be but one measure throughout England,"— that is to say, for wine there shall be but one gallon; not one sort at London, and another at Bristol, and another at York; and so for corn and other things. There shall not be several sorts of measures in several parts of the realm for the same kind of commodity or merchandize. But not that all kinds of things that are to be measured shall be measured by the same kind of gallon, or other measure:—not that wine, and corn, and beer or ale, shall have the same measure. And that this ought to be the meaning and exposition of the statute appears, 1st, from the nature of the things that are measured; they are such as do require a difference even in the proportion. Take the same gallon, and put wine into it, it will be of one content. Put corn into it, it will hold proportionably less in that room; for it lies hollow. And put ale or other liquors that will froth or overflow, when it hath stood awhile there will be still less. So that, fill one gallon with ale, and another of the same content with wine, there will be more wine in the gallon than ale, proportionably; and so corn and dry things, lying hollow in the measure till they be shaken, will not fill up the measure as wine will. 2dly, The practice and usage at all times hath been, accordingly, to have different gallons: the wine gallon, whereby

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(*g*) The Editor is indebted to the kindness of the present Deputy Recorder of Salisbury, Mr. Tinney, for an accurate reference to the book in which this case may be found. It is kept in the Council-house at Salisbury, and lettered on the back, Leger C. 3d. The passage in the text is in fol. 76, b, 77. It forms part of a long entry intituled in the margin, "The Copies of the Council Orders, and Letters, as touching the vintners." The entry of the order of the Privy Council, ends with the following note:—"This copie agreeth with the original remaining of record, in the Register of Counsell.

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such things as wine and other liquors are measured;—the ale or beer gallon, and the corn gallon, and other measures, have differed in their content. It is so in London; it is so all England over. And if the defendant here had done equal justice, he must have used the vintner's pottles, quarts, and pints, as he did the distiller's. It cannot be supposed that men would offend against the law barefaced; and in defiance of the law, by a universal conspiracy, buy and sell directly contrary to acts of parliament from time to time. [It is said, the whole catholic church cannot err in practical fundamentals; and, certainly, the whole nation cannot err against the law; for what makes the law of the land but universal custom and practice?] and universal practice is the best expounder of the laws. [Common usage, in case of measures, hath expounded statutes. If a man sell so many acres of wood, it shall be measured according to the usage of the country, 47 E. 3. 18. 6 Co. 67. 33 E. 1. (*h*). notwithstanding the statute, *De Terris Mensurandis*. And so a recovery in the shire of so many acres shall be taken according to the shire acres; and so it is agreed in the case, 3 Cro. 212. 267. Minge and Eale's case; if a statute mentions miles,—as the statute 23 Eliz. c. 5. provides that none shall employ for coal, or fuel for making iron, any wood growing within twenty-two miles of London, nor within four miles of Rye, &c. the miles are to be accounted according to the usual ways, and common usage; and not as a bird or an arrow may fly. But if a bond be conditioned, if the ground where the woods stood be four miles from Rye, there it shall be taken according to the law, and a geometrical computation shall be sufficient. But statutes shall be expounded according to usage, and so shall grants. If a man grant a barrel or hogshead of beer to another, the beer passeth, and not the vessel: but if a man gets a hogshead, or tun of wine, the vessel itself passeth for usage; and practice expoundeth the words.]

Universal practice is the best expounder of the laws. Common usage in case of measures, hath expounded statutes. In the sale of wood, the acres shall be measured, according to the custom of the country.

Indeed the statutes which command, there shall be but one measure, are but in affirmance of the common law, which saith so much; and are to be expounded as usage and practice hath expounded the common law. The mischief as to the measures was, (which was principally provided against by the statutes 11 & 12 H. VII., and some other statutes,) that some sold corn and the like things by the Winchester bushel, others by other measures; whereby badgers and others cozened both buyer and seller. This mischief was endeavoured to be remedied; and it is a mischief at this day: as he said of astrologians, *hoc*

(*h*) In the parliamentary edition, this is amongst the statutes of uncertain date, Vol. I. p. 206.

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genus hominum semper vetabitur, semper retinebitur, so I may say of these different kinds of measures, they will be always forbidden, always retained. But the diversity of measures according to the nature of the things measured, so there be the same rule all over England, is no mischief at all.

And the common law in this is well explained by our own historians, who mention the time before Magna Charta.—Hoveden, 774, mentions *assisa de mensuris facta per Richardum, regem Angliæ, anno* 1198. *Constitutum est,* saith he, *quod omnes mensuræ totius Angliæ sint ejusdem quantitatis, tam de bladis quam de leguminibus et rebus consimilibus. Mensura etiam vini et cerevisiæ et* cunctorum *liquorum, sit ejusdem quantitatis secundum diversitates liquorum, pondera et libræ et celeræ pesiæ sint ejusdem quantitatis in toto regno secundum diversitates mercaturarum.*

Old print 440. Vide etiam Matt. Par. Anno 1197, po. 584.(i) Wilk. 349.

It appears, the measure for corn was one, for ale another, and for wine another, *secundum diversitates liquorum;* and for weights *secundum diversitates mercaturarum.* The same statutes that appoint there shall be but *una mensura per totam Angliam,* say also, there shall be but *unum pondus per totam Angliam;* yet it is clear some things are weighed by Troy weights, others by avoidupois [Crompton Jurisdiction 221, "the Troy weight contains twelve ounces, and no more; and by it pearls, precious stones, electuaries, gold, silver, and bread, are to be weighed; and the avoidupois contains sixteen ounces, by which other things are to be weighed" so we see the weights are] *secundum diversitates mercaturarum;* and so it is for ale, and wine, and other liquors,—they are severally measures *secundum diversitates liquorum.* The meaning in both cases must be, that the same kind of commodity shall not be weighed, or measured, in one country by one kind of weight or measure, and in another part of the realm by another kind of weight or measure. There shall be the same pound, for instance, for wool, all England over; and so for other merchandise;—and so there shall be the same measure, as a gallon, &c. for wine all England over. But not that the same kind of pound that is for wool, is by Troy weight, shall be also for spices, and other commodities, which are to be weighed by avoidupois. And so for things to be measured, it is not that wet and dry things shall have one measure, as the same gallon, or the like; nor of wet things as wine and ale, that they shall have the same gallon. The measure of ale and beer, in respect of the foulness in working yeast and frothing, is bigger than that of wine.

(i) P. 191, of the edition of William Wats. 1640. These marginal references are in the hand-writing of Mr. Umfreville.

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Crompton in his Jurisdiction of Courts 223. b., reports, (*j*) that "Mr. Wells, clerk of the market for Staffordshire, told him that the ale quart should be greater than the wine quart, because ale will have much froth upon the top, which wine will not; but the tankard for ale or beer, though it be greater than the wine quart, yet there shall be a nick in the tankard made to which the drink shall be full; and by that nick you shall know whether you have your just measure, which ought to agree with the wine quart." And in the place before cited concerning the opinion of Popham, and resolution of the Judges, "that the measures of wine and ale are the same, vide, saith he, 1° Regis nunc c. 9, "It is altered for ale;" and again repeats Mr. Well's opinion. So that even by that very book the measures of ale and wine are not *de facto* the same.

But the meaning of the statutes is, that there shall be but one measure for ale and beer, and the like, through England; one measure for corn, one measure for wine, through England.

[As for the different proportions of these, I do not find them set down particularly in our law books, or in the statutes. But as our law is comprehensive of all sciences and arts, and we make use of physicians, surgeons, curtians, grammarians, and others; and hear them when the matter in law before us requires it to inform our judgments, so I have consulted with brewers and others, as well mechanic artificers as artists, in the particular concerning the different proportions of the measures of wine, ale, and corn; for according to the rule of all these three all other things are respectively admeasured.] The different proportions, (*k*) as I understand, of which are these:

(*j*) Edition 1637.

(*k*) "The great differences that exist amongst the standard liquid and dry measures throughout the kingdom shew the great necessity there is for a complete equalization. According to the laws that at present exist in England, there are three different gallons for wine, ale, and corn, which are commonly reckoned to contain two hundred and thirty-one cubic inches, two hundred and eighty-two cubic inches, and two hundred and eighty-eight cubic inches and four-fifths, respectively. There is *no doubt*, however, that a common gallon was originally used for liquids of all kinds, as well as for grain, although the above differences have obtained in consequence of causes which, at this distance of time, *cannot be completely ascertained*. The commissioners, in their last report, recommend 'that the ale and corn gallon be *restored* to their original equality by taking, for the statutable common gallon of the British empire, a mean value, such that a gallon of common water may weigh ten pounds avoirdupois in ordinary circumstances, its contents being nearly 277·3 inches.'" Wallace on Weights and Measures, Glasgow, 1822. "Magna Charta points out the quarter of London, as the only standard for measures and weights of that time: but we are left to *guess* of what measure or weight it was the quarter part."—Dr. Kelly's Metrology, p. 46, 1816. Our view of the

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the measure of the gallon for wine contains two hundred and thirty-one cubical inches; the measure of dry things, as corn, &c. about two hundred and seventy-two inches; and the measure for beer and ale about two hundred and eighty-eight inches and three quarters. The proportion between these three gallons is 28, 33, 35; and so the proportion between the wine and ale gallon is as four to five. And so the ale or beer bottle, quart, or pint, is a fifth part bigger than the wine gallon, &c. The gallon, and bushel which are by the statute of 12 H. VII. (which are the measures by the statute appointed to be in the custody of the mayor of Maidstone) are made only according to the assize for dry things, as corn; and do neither agree with the measure of wine, which is less, nor of ale which is more.

And, as I have been informed, at the same time that this standard bushel and gallon was made, there was also made the common bushel, which is at this day in the Exchequer, and is bigger than the standard bushel for corn, by one-eighth part, and holds eight gallons according to two hundred and eighty-eight and three quarters cubical inches; which fully answers the proportion of the ale gallon from the wine gallon to be five to four, *viz.* a fifth part more. [And also I have been informed that there is an ale quart at this day in the Exchequer; which ale quart is taken notice of in the stat. 12 Car. II. c. 23. and 24 of the Excise, s. 8; and is bigger than the wine quart; and, as artists say, contains $72\frac{1}{3}$ inches; which is the fourth part of $288\frac{1}{4}$ cubical inches, which is the content of the ale gallon; and it is called the ale measure, or Winchester measure. And this ale quart in the Exchequer is a fifth bigger than the wine quart; and an eighteenth part bigger than the corn quart, which agrees with the Exchequer gallon made 12 H. VII.; and four ale Exchequer quarts overrun that Exchequer gallon, (which is the same gallon which is at Maidstone,) almost half a pint.

To satisfy myself in point of fact, I went into the Treasury of the receipt of the Exchequer; and there, besides several broken measures, I find several weights of Troy and avoirdupois in metal, which they tell me are exactly agreeable with those in the Tower. And I suppose also they have, or should have, assay (*l*) pieces of gold and silver. But as to measures,

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customs of the country with respect to weights and measures in and before the reign of Henry the Third, will be found to be illustrated by the before-mentioned very curious note from the Cotton MSS., printed in the Appendix E.

(*l*) At the trial of the pix, or inquiry by a jury of goldsmiths, before certain members of privy council, in April 1822, into the purity of money coined at the mint, there was produced, by the proper officer of the Exchequer, a "trial piece of

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I find none of the time of King H. 7., but only one bushel: but there is another brass bushel of 41 Eliz., and a brass gallon, quart, and pint. What the content of the said bushel of the time of H. 7. is, I know not, otherwise than as I have been informed before. But the officers there tell me that the quart and pint there do not agree in proportion with the bushel of 41 Eliz.; and they appear to me to be larger; that the quart there is a full ale quart. And they produced to me an extract of a letter by Mr. Arthur Agard, the 29th of June 1592, concerning the assay of gold and silver to the then Lord Treasurer; wherein he doth write *(inter alia)* "that there were then no standards of avoirdupois weight, nor yet Troy weight, nor measures of bushels, gallons, quarts, elnes, or yards in her Majesty's treasury, according as the statutes do limit. But that there are old weights and measures, which being new founded would make very good new ones." And this complaint, I suppose, was the occasion of the new weights and measures, 41 Eliz. By which it appears there was not, in 1583, any such standard in the Exchequer as the Judges conceive; and that in 41 Eliz. there were in the Exchequer standards of several sorts, the ale quart, and so proportionably, that gallon exceeding the gallon there which was for corn. Which measures, though then made in 41 Eliz., yet I suppose were warranted by those which were in the Tower, and other places. And though Mr. Crompton saith that the ale quart was allowed by 1 Jac. c. 9., he is mistaken; for the quart was before that time in the Exchequer; and the statute, 1 Jac. speaks of the ale quart, or beer quart, as of a thing the different contents whereof were usually known; and the content whereof being generally known, and without any statute to set forth the assize of it, is a strong evidence of the law. *Quod ubique, quod semper, quod ab omnibus*, is a rule for a greater matter than those measures of ale, and corn, and wine. But upon all this I infer that there are different measures by law; and by the late act for preventing frauds, and regulating abuses in his majesty's customs, there is at the end of the act an imposition upon every gallon of salt imported out of Scotland, of *Winchester* measure, a halfpenny.]

And according to these different measures, it is observed by

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gold," which was deposited there in October 1688, as of true standard of twenty-two parts gold, and two parts alloy. This piece bears the guinea impression of king James the Second on one of its corners. It was of considerable weight when first deposited; but is now much reduced in size, from the number of assay pieces taken from it by the pix juries within the last one hundred and thirty-four years.—*Account of the Trial of the pix. Gentleman's Magazine for May* 1822.

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By the common law, and commonpractice expounding it, the measures of wine, and of ale or beer differ.

Mr. Greaves, in his Treatise of Denarius, that there are three standards in this nation, the standards in the Exchequer, at the Tower, and at Winchester. And I am informed the standard at the Tower for the gallon agrees with the wine gallon; the standard of Winchester agrees with the ale gallon; and the standard gallon of the Exchequer agrees with the corn gallon. So that I conclude from hence, by the common law, and common practice expounding it, the measures of wine, and of ale or beer, are differing; and that the statutes which mention there shall be but one measure throughout England are to be understood that there shall be but one measure for the same species; as there shall be but one kind of measure for wine throughout England, one kind of measure for corn, and one kind of measure for ale and beer; and so of all other things of like kind.

And, lastly, this difference appears by the statutes themselves. Magna Charta, c. 25. seems to me express in it; and gave to me the first hint of the difference, which I now take. It is said there, "one measure of wine shall be throughout the realm; and one measure of ale; and one measure of corn; that is to say, the quarter of London; and it shall be of weights as it shall be of measures."

The words, "measure of wine," "one measure of ale," and "one measure of corn," I suppose, are plain to mean, not one and the same measure for wine, ale, and corn, but one measure for wine, another for ale, and a third for corn; but to be one for wine throughout all England, and so for the rest. As it is of weights, not only weighing by Troy weight, but also by avoirdupois weight; and according to this difference all the other statutes (notwithstanding the general words of them) are to be understood.

So, *ordinatio pro mensuris*, 31 E. 1., that I mentioned before, expresseth a *wine gallon*; not a *gallon* generally, but of *wine*: "Eight pounds make a gallon of wine;" therefore there are gallons besides wine gallons. And the statute 1 Jac. c. 9., cited before, provides "that an alehouse-keeper shall not utter less than one full ale quart, (it is not simply a quart, but an *ale* quart,) of the best beer or ale for a penny." Therefore there are other quarts than ale quarts, and consequently other gallons than ale gallons. And now the ale measure is known generally by that name; and is sometimes called, as I said before, Winchester measure.

And the common brewer is not to sell beer, or ale, by the statute 23 H. 8. c. 4., in any barrels, or other vessels, other than such as shall be marked by the cooper. Now that statute, 23 H. 8. c. 4., is observable to this point; there it is said,

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that "the barrel for beer to be made by the cooper shall contain thirty-six gallons, and every barrel of ale thirty-two gallons of *the king's standard gallons*; that vessels for soap shall be according to the rates, contents, weights, and assizes of old time used, that is to say, every barrel to contain thirty-two gallons, and to be in weight twenty-six pounds;" and this is according to the wine measure; for soap is always so measured. But it provides "that every cooper who shall make any ale vessel mentioned in the act shall make it according to the assize specified in the Treatise, called *Compositio Mensurarum*, (*m*) that is to say, every barrel for ale contains thirty-two gallons of the said assise as above, of which eight gallons make the common bushel to be used in this realm." What is become of that treatise of *compositio mensurarum* (if there were any such) I cannot learn: but upon it I conclude that the gallon measure of ale is larger than the wine gallon by the statute; for it is, expressly, that eight gallons make the common bushel, which is the bushel I mentioned before, and is now in the Exchequer; and appears to be a fifth part more than the wine gallon, as is affirmed by artists.

[In old Magna Charta, *ordinatio pro mensuris*, printed as made 31 E. 1., is called *compositio mensurarum*.]

And this is also manifest by the common practice of the coopers, ever since that statute; for by that statute, 23 H. 8., the wardens of the coopers of London are to search, view, and gauge all manner of vessels for ale, beer, and soap, to be put to sale in London, and within two miles' compass. The scantling for beer and ale of the coopers, and according to which their barrels are sealed, is an addition of a fifth to wine measure; and the beer barrel contains thirty-six gallons, and the gallon contains two hundred and eighty-eight inches and three quarters, which is the largest measure. And trial hath been made upon several occasions at Coopers'-hall of the dimensions of a barrel, as they sealed them for the brewers, and according to the standard delivered to them; and it contains thirty-six gallons, each gallon containing two hundred and eighty-eight inches and three quarters. And the statute 31 Eliz. c. 8. enacts "that no brewer shall sell any beer or ale, in any vessels brought from beyond sea in London, before the

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(*m*) "An instrument intituled '*Tractatus de Ponderibus et Mensuris*' is printed in Cay's edition as of 31 E. 1. from MS. Cott. Claudius D. II. (fol. 259) In Berthelet's *secunda pars* Vet. Stat. 1532, is an instrument intituled, '*Compositio de Ponderibus*,' without any date. The copy in the text is fuller than either."

Note to "the Assize of Weights and Measures," printed amongst the statutes of uncertain date in the late edition by authority of Parliament. Vol. I. p. 204.

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same be lawfully gauged, and the true content set down upon the same by the gallon appointed and allowed for beer and ale, *according to the standard*, by the master and wardens of the coopers." That statute takes notice of the coopers' standard, and of a gallon appointed and allowed for beer and ale, distinct from other gallons allowed for other things. So that I think it is manifest by the several standard measures in the Exchequer and elsewhere, by the common practice, and by the statutes themselves, that the measures of wine, corn, and ale, are by law different; and the gallon and bushel appointed by the statute 12 H. 7., are to be taken only for the measure for corn, and for such things as are to be measured as corn.

And there was great reason to send down such a gallon for corn into the country; for that statute of 12 H. 7., renewing the old standard measure, which was the wine measure, if the proportioning the corn gallon, and the beer and ale gallon, had been left to the country, they would have mistaken their proportion; and therefore the statute 12 H. 7., doth not only take care to set right and revive the old standard measure, which was of wine, but also for a right proportioned measure for corn, which exceeded that standard; and the standard for the wine quart is and hath been kept at Pewterers'-hall time out of mind. (*n*)

There is one more objection may be raised, to which I shall give an answer; and that is, by the statute 23 H. 8. it is enacted, "that a barrel of beer shall contain thirty-six gallons by the standard gallon;" and by the *ordinatio pro mensuris* the standard gallon is expressly the wine gallon; and the statute 16 Car. is, "there shall be but one measure according to the standard of the Exchequer:" and therefore it is inferred that beer and ale are to be by the standard gallon; and the standard gallon is the gallon for wine, as it appears expresaly by the statute *ordinatio pro mensuris*. And several other statutes there are to the same purpose, that all bushels, peeks, pottles, and quarts, shall be according to the king's standard; and so 16 R. 2. c. 3., all the weights and measures through the realm shall be according to the standard.

This objection is in part the same with the other which was made before, and the same answer is applicable to it. But I further answer:

First, that if it were so that the king's standard gallon,

(*n*) In the bill brought into the House of Commons in the last session (see Appendix D and E) there is a provision for recourse to be had to a less exact criterion for ordinary uses to prevent irregularities, where the best standard should not be of easy access.

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which is the wine gallon, were to be the measure of all commodities, then the corn gallon, (which is bigger than that standard gallon,) which is the gallon at Maidstone, would be also against law; and consequently the breaking of the distiller's gallons for not agreeing with the *corn gallons* is against law.

But, secondly, admit by the meaning of the acts of parliament 16 Car. 1., and the rest, that there is to be but one measure according to the standard, that is, the king's standard properly so called, that is the wine measure, (as in truth upon consideration of divers of the statutes the latter seems to import, and the statute, 12 H. 7. c. 5., though it provides the corn gallon, yet refers to that statute of 31 E. 1., and directs it to be made after the said assise.—I say admitting this, yet it must bear this interpretation,—not that according to a geometrical measure, the measure shall be as that very standard; but—that according to that standard, by analogy and proportion, all other things shall be measured *secundum diversitatem liquorum et mercaturarum*. Those things whose measure is, as wine, exactly according to the standard, as soap, oil, strong waters, cider, honey, &c.; those things whose measure is as corn and other dry things, in analogy and proportion to it, as 33 to 28; and ale and beer in analogy and proportion to it also, *vix.* as 35 to 28; and this assise is still kept by tradition and practice, particularly amongst the coopers; and as *ex pede Herculis*,—by the rule of proportions,—by the proportion of the foot the statuary could make the full image of Hercules; so by reference to the king's standard for wine all other measures might be made, and not that they should agree exactly in the very same measure as a geometrical proportion. And this appears in point of fact; for in truth, as I said before, the gallon and bushel by 12 H. 7. are the corn measure, and differ from that standard measure to which it refers, *vix.* that every gallon contains eight pounds of wheat of Troy weight; for a pound of wheat of Troy weight exactly fills the wine pint, and not the corn pint, which holds more. The Exchequer gallon, by 12 H. 7., holds above nine pounds of Troy weight; and so also, although the statute 23 H. 8. expressly mentions the barrel of beer or ale to be so many gallons of the king's standard gallon, yet it refers to the assise in the Treatise *De Compositione Mensurarum*, of which eight gallons makes the common bushel. Now the common bushel and the standard bushel not being the same, as I said before, it is impossible to reconcile the statutes to themselves, and to common practice: but by this interpretation, that the king's standard so properly called, (the wine measure as it is settled

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by 31 E. 1. and 51 H. 3.) shall be the measure, by analogy and proportion, whereunto all other things measurable shall be measured, *secundum assisam et diversitatem liquorum, et mercaturarum*, and not *secundum capacitatem*, the very same measure indeed, and by a geometrical proportion.

And just so it is for weights. There ought to be but *unum pondus*, that is, the Troy weight; but yet we measure other things by avoirdupois, because of the garble and filth that is in them; which if it were abstracted would in effect be Troy weight; as the hollowness in dry things upon measuring of them; the froth yeast and working in ale and beer being considered and abstracted, the measure will in effect be the same with the wine measure. And so it is also for a yard. The statute, 17 Car., saith there shall be but one yard, yet stuffs are measured by the ell because they are apt to shrink; and so are measured by the ell, which is according to the rule of proportion, as five to four, by estimation. And for my own opinion, I conceive that old standard for measures founded upon the denarius, or penny, is the ground whereto the mathematicians proportion their weights; and in the composition of that standard there is also the ounce, (which by the statute 12 H. 7. is said to be after the Troy weight,) and it is well said by Mr. Greaves, fol. 128, "as by measures weights may be preserved, so on the contrary, by weights measures may be restored."

If it be so, that it is the standard for weights as well as measures, it necessarily follows, that the same being the standard for both weights and measures, it is to be understood only from analogy and proportion.

I have one thing more to observe. The statute of 11 H. 7. c. 4., to which 12 H. 7. refers, is expressed, that "that statute shall not extend to selling or buying by water measure within the shipboard;" and enacts, "that the water measure shall only contain five pecks, after the said standard thereby made, razed, and stricken;" and the statute 16 Car. c. 19. expressly provides that such measure as is commonly called water measure, in any ports, maritime towns, or *other places*, shall be still used and continued as formerly the same hath been, any thing in this statute contained to the contrary notwithstanding.

The statute of 11 H. 7. limits the water measure to shipboard: but 16 Car. extends to any *other places*. Now this water measure thus razed and stricken, appears to be a fifth peck more than the wine measure (so is 11 H. 7.) and is the very same which is for beer and ale, the ale gallon being a fifth part more than the wine gallon, and so is expressly allowed by the statutes and the common practice, ten gallons of

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wine measure making eight gallons of water measure, which is the common bushel, or Winchester bushel used throughout the realm on the water, or shipboard; which measure, I conceive, for liquids, may be used by virtue of the statute of 16 Car. in any place.

Solemn judgments distinguished from resolutions of the Judges upon reference or reports to them.

As for the objection made from the resolution of the Judges in the year 1583, I give these answers to it, that it was an extrajudicial opinion; and though I must give reverence to the opinions of the Judges, yet I make a difference between cases adjudged upon debate and having counsel on both sides, and resolution upon a case reported or referred to them. Secondly, that the principal matter referred there was, whether wine must be sold by the content of the measure, or by weight, as the Salisbury men pretended, in which point the resolution of the Judges was clearly according to the law. So that their other resolutions were but *obiter* and *ex abundanti*. But, thirdly, I say those resolutions were grounded upon mistakes in part; namely, they conceived there was but one standard in the Exchequer, and that the standard both for wine and ale; both which are mistakes, as I hope I have made appear.

First, that the measures in the Exchequer, as the ale quart, the gallon, and the two bushels there remaining, are differing.

Secondly, That the wine measure is not there at all, which is properly the king's standard.

And, thirdly, I observe that this resolution was in 1583: and 1592, nine years after, Mr. Agard writes to the lord treasurer, that in the treasury of the exchequer they had neither bushel, gallon, quarts, ells, nor yards, according as the statutes do limit. And, therefore, if that were true, (as I take it clearly it is, if he meant the wine measure,) when the Judges declared that neither wine nor ale ought to be sold by any other measure than such as agreed with the standard in the exchequer, they erred in both; for that measure being the corn measure was too big for wine, and too little for beer or ale.

And, lastly, I will encounter that resolution with a greater authority, the act of parliament, 12 Car. 2. c. 23. s. 20. the act for the excise; which, though it was made since our case in question, yet it being not only an enacting but a declaring statute, and an interpretation of the former, and direction for the future practice, I conceive is a full resolution to the point in question. The words of it are these:—"for the avoiding of all incertainty and dispute touching the returns made or to be made by the gagers of any beer or ale; be it enacted and *declared* by the authority aforesaid, that every six-and-thirty gallons of beer taken by the gage *according to the standard of the ale quart*, four whereof shall make the gallon, remaining in

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the custody of the chamberlains of his majesty's exchequer, shall be reckoned, accounted and returned by the gager for a barrel of beer; and every two-and-thirty gallons of ale taken by the gage according to the same standard shall be in like manner reckoned, accounted and returned for a barrel of ale; and all other the liquors aforesaid, according to the wine gallon." The "*liquors aforesaid*" mentioned in the act are *perry cider, strong waters distilled, metheglin, and the like*, which very words are also in the other act 12 Car. 2. c. 24. for taking away the court of wards and purveyance, and settling a revenue in lieu thereof. Out of which act you may observe:—

First, That there is a distinction between the ale and the wine gallon, allowed by the statute.

Secondly, That the measure of the ale gallon is to be according to the ale quart in the Exchequer, which, as I shewed before, is the greatest measure, and greater than that at Maidstone.

Thirdly, That strong waters and distilled waters are to be sold not by the measure that beer and ale are, the ale gallon, but by the wine gallon, which is the point now doubted by the jury.

And, lastly, that this is not only enacted, but declared.

So that upon the whole, I conceive—First, the law requires the same measure for the same kind of species. Secondly, That the king's standard, or wine standard, either is not the exemplar for all; or if it be, it is only by analogy, and proportion; and that the constant universal practice, taken notice of, and approved by the statutes themselves, has allowed different measures, according to the different nature of the things to be measured; and that is the best and safest exposition of the law which agrees with constant practice, so that for the matter in law, if it were well found by the verdict, I hold for the plaintiff.

But, secondly, I conceive this verdict is wholly insufficient, and that *juratores male se gesserunt in veredicto reddendo*, (as the entry is where a *venire facias de novo* ought to issue,) and that there ought to be a *venire facias de novo*.

For that, the case is: the action is an action of trover and conversion for taking away a pewter gallon pot, a pewter quart pot, a pewter pottle pot, a pewter pint pot, thirty pounds' weight of pewter pot metal, and thirty pounds' weight of other pewter metal called lay.

The special verdict finds that the plaintiff was possessed of the several pots in the declaration, and so finds the special matter as touching the pots. But as to the thirty pounds' weight of pewter, and thirty pounds' weight of lay, they say nothing; and neither find the plaintiff possessed, or not pos-

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sessed, or the defendant guilty or not guilty of the conversion. And though the conclusion is special: that if the standard measures for retailing ale and wine be not the same, then that the defendant is guilty *de præmissis infra contentis modo et forma, as the plaintiff hath declared;* yet this conclusion being grounded upon the special matter, which extends not to the pot metal, or lay; and the Court being to judge upon the whole matter, it is all one as if the verdict had found him guilty for the pots by express words, and as to the rest found nothing at all.

Now that hath been often adjudged, as you may see C.C.277 a. and a great many authorities there cited. If a verdict find part of the issue, and finds nothing for the residue, this is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. And he cites a case stat. 25 Eliz. as a writ of error between Brace and the Queen in the Exchequer Chamber. An information of intrusion is brought against one for intruding into a messuage, and one hundred acres of land: upon the general issue the jury find against the defendant for the land, but say nothing for the house; this is insufficient for the whole. And the reason in law of it is, that they are *jurati et onerati ad veritatem de præmissis dicendum*, that is the whole *præmissa;* and if judgment should be given only for part of that which is in issue, and nothing found for the residue, the plaintiff must be put to a new original, and the defendant to a second vexation, and may plead a new plea; whereas, if there be only a *venire facias de novo*, the old original and pleadings do stand, and as the case requires, the plaintiff may be in *misericordia* or *capiatur pro fine;* whereas if such a verdict should stand good, there should neither be the one nor the other.

But the doubt is, whether this be not holpen by the statute of 32 H. 8. c. 30. of Jeofayles.

In an action of trespass for entry into one hundred acres of land the defendant pleads as to part, and not to the residue; and issue taken, and verdict for that part for the plaintiff: this is a discontinuance; and some opinion is, that it is aided by the statute 32 H. 8.; and so is Gomersall's case cited 11 Co. 6. In Heydon's case, in account of divers receipts and parcels, the defendant pleads to issue for all but one parcel, and to that pleads nothing; this was agreed was aided by the statute of 32 H. 8. after verdict, because the statute is "*any discontinuance* notwithstanding;" and agreeable is Freeiston's case, Hobart 187. and 2 Cr. (*o*) But whether that statute extend

(*o*) Qy. Wats *v.* King, Cro. Jac. 353.; and see the case of Humphry and Bartley below, in this Volume.

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The statute of 32 H. 8. c. 30. of jeofayles, after issue tried, aids negligence or default of the parties, their counsel or attornies; but not the verdict, or fault of the jurors.

to such a discontinuance in not pleading, or to a discontinuance for not continuance of process only, may be a question. But our case being a fault in the verdict itself, and not in the proceedings before, is clearly a different case; and is not remedied by the statute of 32 H. 8. which, after issue tried, aids negligence or default of the parties, their counsellor or attornies, but aids not the verdict or fault of the jurors, which is the fault here, the issue being right.

And, therefore, a *venire facias de novo* ought to issue; and so it was agreed in Brace's case, which I cited before, which was 25 Eliz. after both the statutes of 32 H. 8. and 18 Eliz. of Jeofayles.

There are several other faults in the verdict: as, namely, it is not found that the pots, which were found defective, were the same pots which are in the declaration; nor is it found that the pots were defective, or not according to the standard; but only that they were tried in the court of the clerk of the market, and *there* found less than the standard at Maidstone.

The jury find that they were of the bigness of wine measure, but that the wine measure was less than the standard, they find not. Nor do they find that distilled waters ought to be sold by the same measures as wine. And some other defects there are in the verdict, but many of these are supplied by the special conclusion.

But the not giving any verdict at all, touching the pot metal and lay, makes the verdict wholly imperfect; and for that cause a *venire facias de novo* ought to be awarded.

But although judgment cannot be given upon this verdict, yet the Court having declared their opinions touching the matter in law, I suppose upon a new trial the Justices of *Nisi Prius* will give directions to the Jury for a general verdict for the plaintiff, if in the mean time the defendant do not give him satisfaction.

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Hil. 12 & 13 Car. II. Rot. 1586.

(Lease for years in reversion, under a special power to a tenant for life to grant leases for years or lives sustained. The instrument creating the power having directed a particular rent to be reserved, a reservation informal in respect of the persons to whom the rent is made payable, will carry the rent to the remainder-men: because the informality consisted in surplusage only; and the words of the actual reservation satisfied the power.)

BRIDGMAN, C. J.

Harg. MSS. No. 55. fol. 139, No. 56. fol. 1. Ejectment.

Robert Berry hath brought an action of trespass and ejectment against John White, of one messuage, one water milne, two hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and three hundred acres of wood, with the appurtenances, upon the demise of Henry Howard Esquire, 10th October, 12 Car. II. for five years, from Michaelmas then last past; and declared to his damage of 40*l.* Upon not guilty pleaded, the Jury found a special verdict:—

Special verdict. Sir Charles Howard seised of the premises in fee, demised them, 10 Apr. 6 Jac. to E. R. for a term of years, who entered. In Easter term, 15 Jac a fine levied of the premises by Sir Charles Howard and others.

That Sir Charles Howard was seised in fee of the tenements specified in the declaration; and being so seised, 10 April, 6 Jac. demised them to Elizabeth Ridgeley for forty years then next following, paying yearly, during the said terms, 26*s.* 8*d.* at Michaelmas and Lady-day. That she entered by virtue of that lease; and that being thereof possessed, and Sir Charles being seised of the reversion, Pasch. 15 Jac. a fine was levied in the Common Pleas, of the tenements aforesaid, with the appurtenances thereto belonging *(inter alia) sur conusance de droit come ceo,* &c. with proclamations by the said Sir Charles

(*a*) "The Lord Bridgman's argument, wherein he delivered the opinion of the whole Court, Michaelmas, 14 Car. II." Harg. MSS. No. 56. fol. 1. This case is mentioned in Opie *v.* Thomasius, 1 Keble 911, 912; and it appears to be cited by another name, in Hardres, 412.; see Sugden on Powers, 601, 602, ed. 1821. But it was decided on the special penning of the power with reference to a lease in reversion, not with reference to a concurrent lease upon lands, let at the time of the creation of the power, (See Appendix F.) A loose note of the argument of counsel in this case is in No. 3781. of the Ayscough MSS. in the British Museum, where, p. 70. the books cited are, Co. Litt. 243.; Dyer 183.; 8 Co. 95.; 9 H. 7. 26.; Dyer 290.; Er. Fornedon; Dyer 357. 246.; 2 Cro. 349.; Godbolt 195, Parrett Rolfe's case; Dyer, the Earl of Northampton's case; 1 Cro. 36. Hobson's case, and Whitlock's case.

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Howard, Sir Robert Howard, Sir William Howard, and Sir Edward Howard, to Thomas, Earl of Suffolk, and the Lord William Howard, by the names of the, &c.; and that the said fine was levied to the uses specified in an indenture, dated 30th April, 15 Jac. between the said Sir Charles, Sir Robert, Sir William, and Sir Edward Howard of the one part; and the said Earl of Suffolk and Lord William Howard of the other part: which indenture they find in *hæc verba*:—

30 Apr. 15 Jac. the said fine declared to enure

Whereby Sir Charles Howard, &c. covenant by fine, or other good assurance, to convey to the said Earl, and Lord William Howard, before the feast of St. James, next ensuing, the said honours, &c. to the uses under and upon the powers, provisoes, and limitations thereinafter expressed, that is to say;

To the use of Sir Charles for his life, without impeachment of waste; and after, to the use of the first son of Sir Charles, and the heirs male of his body; with like particular remainder to the second, third, &c. and eighth sons of Charles, and the heirs male of their bodies. And for default of such issue, to the use of Sir Robert Howard, for his life, without impeachment of waste; and after his decease, to the use of the first son of Sir Robert Howard, and of the heirs male of the body of the said first son, with like remainder to eight sons; and for default of such issue, with like remainders in use to Sir William and his sons, and Sir Edward and his sons; with several other like remainders to Sir Thomas Howard, and Theophilus Lord Walden, other sons of the said Earl; and the sons of the said Sir Thomas and Lord Walden; and for default of such issue, to the use of the right heirs of the said Charles.

to the use of Sir Charles for life, S. W. with remainder to his first and other sons successively, in strict settlement; with remainder to the use of Sir Robert Howard for life, S. W.; with remainder to his first and other sons, in strict settlement; with like remainder to the use of Sir William and his sons, with like remainders over in strict settlement, with an ultimate remainder to the use of the right heirs of Sir Charles.

Provided always, and it is covenanted, granted, concluded and agreed, by and between the said parties to these presents, that it shall and may be lawful, to and for the said Sir Charles Howard, at all times, and from time to time, during his natural life; and after

Power of leasing. For the settler at all times during his life, and for the tenant for life respectively being lawfully seised, and lawful tenants of the freehold in possession of the premises by virtue of the limitations, to make any lease of any part thereof, usually leased, or then on lease, to any person or persons, for any term or terms of years, or life or lives: so as such estate and terms exceed not the number of twenty-one years, or three lives, in possession and remainder; or for any number of years, determinable upon one, two, or three lives at the most: and so as the same should not be made dispunishable of waste; and so that the existing rent or other profits, or more, should be reserved for the same.

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his decease, to and for the said Sir Robert, Sir William, Sir Edward, Sir Thomas, and Theophilus Lord Walden, and every of them respectively, being lawfully seised, and lawful tenants of the freehold, in possession of the said honours, lordships, manors, and premises, or any of them, or of any part of them, or any of them, by virtue of any limitation of use by these presents before limited, and of any estate, according to the same, to be executed at all times, and from time to time during their natural lives, respectively to make any lease or grant of any part of the premises usually leased heretofore, or now on lease, whereof they or any of them respectively shall be lawfully seised, or be lawful tenants of the freehold in possession, to any person or persons, for any term or terms of years, or life or lives, so as such estate and term exceed not the number of twenty-one years, or three lives, in possession and remainder; or for any number of years determinable upon one, two, or three lives at the most; and so as the same be not made by any covenant, grant, or clause, dispunishable of waste, and that so much yearly rent, or other profits, as is now reserved, yielded and paid respectively for the same, or more, be reserved. And it is also covenanted, granted, and agreed between the said parties, that the said Earl of Suffolk, and Lord William Howard, and their heirs, shall from and after such leases and grants, last before mentioned, so made and granted according to such power formally expressed, stand and be seised of all and singular the lands and tenements so leased and granted, to the use of such lessees and grantees, their executors, administrators, and assigns, according to the tenor, purport, and true meaning of the same grants and leases; and afterwards to such uses, intents and purposes as in these presents are limited and declared. And it is granted, declared, and agreed, by and between the said parties to these presents, for them and their heirs respectively, that the said fines and other assurances, so covenanted and intended to be had, levied, and made of the said premises as aforesaid, shall be, and shall be adjudged, construed and taken to be, and that the said Earl of Suffolk, and Lord William Howard, and their heirs, shall, by virtue thereof, and of these presents, stand and be seised of, for and concerning such and so much of the said premises as shall be so demised, granted,

The trustees and their heirs to stand seised of the premises so leased to the use of such lessees, their executors, administrators, and assigns, and afterwards to other uses in the settlement.

The trustees and their heirs to stand seised of such of the premises as afore-

leased, or in use limited as aforesaid, to the use of such person and persons, and of his and their executors, administrators, and assigns respectively, to whom any such demise or demises, lease or leases, or limitation of use or uses, shall be so made, limited, or granted as aforesaid, for and during such and so long time, and term or terms, for the which such demise or demises, lease or leases, or limitation of use or uses, shall be had or made as is aforesaid; so as every such person or persons to whom any such demise or demises, lease, &c. shall be so made, and his and their executors, administrators, and assigns, shall and do, severally and respectively, yearly, well and truly perform, yield and pay to such person and persons to whom the reversion or remainder of the said premises, so happening to be demised, &c. shall for the time being appertain or belong, or to his or their bailiff or receiver for the time being, the yearly rent or rents, or other duties and services, in or by such demise, lease, or limitation of use or uses reserved or agreed, or by custom, to be paid, and at the days or times, and in such sort, manner and form as in or by such demise, &c. shall be in that behalf limited, and according to the reservations therein to be contained, to him and them, to whom the next and immediate reversion or remainder of the same premises shall by the true intent of these presents belong.

said, to the use of such lessees, their executors, administrators, and assigns respectively as aforesaid; so as such lessees, &c. truly performed and paid the yearly rent or rents, duties and services, to the person and persons to whom the reversion or remainder of the premises should come, or his or their bailiff or receiver, at the days, and in such manner, as in the respective demises shall be limited.

The Jury further find the death of the said Sir Charles without issue; and the seisin of Sir Robert of the reversion; and that he being so seised, and Elizabeth Ridgeley possessed, Sir Robert, by indenture, 16 Feb. 14 Car. 1. did demise the said tenements *in quibus*, &c. to Robert Villiers, *habendum* to him, his executors and assigns, for ninety-nine years, fully to be complete and ended, if the said Robert Villiers should so long happen to live; the said term to begin by, from, and after the death, surrender, forfeiture, or other determination of the estate which the said Elizabeth Ridgeley then had in the said tenements, with the appurtenances, and not before; rendering and paying, therefore, yearly, after the commencement of the said term, and during the continuance thereof, to the said Sir Robert Howard, his heirs and assigns, 26*s*. 8*d*. at Michaelmas, and by equal portions; and further

Death of Sir Charles without issue, and Sir Robert being seised of the premises, demised them, in the lifetime of E. R. to Robert Villiers, for ninety-nine years, if he should so long live; the said term to begin after the determination of the estate in E. R. and not before; and Robert Villiers paying yearly, during the term, 26*s*. 8*d*. to Sir R. Howard, his *heirs and assigns*.

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yielding and paying as in the indenture; which indenture of lease is found *in hæc verba*. Wherein there is a further reservation of heriot, suit of court, and other services, customs, and duties, as at any time before were paid, yielded, or due for, and in respect of the same, by the custom of the honour of Clun or otherwise; and all reasonable fines and amerciaments, as at any time during the said term shall be assessed, taxed, or imposed upon the said Robert Villiers, his executors or assigns, for default or neglect of doing the suit of court, or for any contempt by him or them in the same court, with a clause of entry and distress for *Sir Robert, his heirs and assigns*, if the said yearly rents, or suit of Court, heriot, sums of money, or any of the said customs and duties before reserved, or any of them, be behind in part, or in all, by the space of twenty-eight days.

All fines due by the custom of the honour of Clun reserved,

with a clause of entry and distress for Sir Robert, *his heirs and assigns*, for services behind, for twenty-eight days.

And the Jury find, that by virtue of this lease, in the life of Sir Robert Howard, before the time of the trespass and ejectment, and immediately after the expiration of the said term of the said Elizabeth Ridgeley, the said Robert Villiers entered, and was thereof possessed; and that the said rent of 26*s*. 8*d*. was anciently the usual rent paid for the tenements aforesaid; and that the said lease to the said Elizabeth Ridgeley was *in esse*, continuing, and unexpired at the time of the said lease made to the said Robert Villiers.

After the expiration of the term of E. R. the said R. Villiers entered; rent reserved, the ancient rent. The lease to E. R. *in esse*, at the time of the lease made to R. Villiers.

That Sir Robert Howard afterwards had issue, Henry Howard the lessor, his first son; whereby the said Henry Howard became seised of the remainder, to him and the heirs males of his body; and Sir Robert being so seised, with remainder to his son as aforesaid, and Robert Villiers being possessed as aforesaid, 1st April, 5 Car. 2. Sir Robert died; and that the said Henry Howard, the said 10th day of October 12 Car. 2., did enter as in his remainder upon the possession of the said Robert Villiers, and did expel and amove him, and was seised *prout*, &c.; and being so seised, the same day did lease to the plaintiff *prout*, &c. And that the plaintiff entered, and was possessed until the defendant, as bailiff, and by special command, and in right of the said Robert Villiers, did enter upon the possession of the plaintiff, and did oust him. But whether upon the said whole matter, in form aforesaid found, the entry of the

Sir Robert died 5 Car. II. and his first son, tenant in tail entered, and ousted R. V. and leased to the plaintiff; and plaintiff entered, and he was ousted by defendant.

said defendant upon the possession of the plaintiff be good and lawful, they knew not, &c. and refer it to the consideration of the Court. *Et si*, &c.

Upon this special verdict, it appears, the question is upon the validity of the lease made by Sir Robert Howard,—

Whether it be according to the power before recited.

But before we come to the consideration of that question, there is one thing hath been objected and insisted upon at the bar, which makes an end of the case if it cannot be answered; and that is, that if the lease were good, and pursuant to the power, it is determined before the entry, whereon the action is brought; for it is a lease, "*ita quod*" he pay his rent, and for non-payment it ceaseth in point of limitation; and it appears that Mr. Villiers had entered in the life of Sir Robert, and that he died in April 5° of the king, and the lessor entered not till October 12°; so that there was above seven years, during all which time it is not found that he paid any rent; and it is part of his title to his lease "for as he pay his rent;" that is the express clause; that the fine and other assurances shall be to the use of such lessee, "for as he pay the rent to him in remainder."

But this objection, in my opinion, receives a clear answer:

First, As this deed is penned, I do not conceive, at least it is a question whether, this estate is determinable by non-payment of rent; for there be three clauses considerable to this purpose: first, the power to make leases, "so as they exceed not three lives, &c. And that so much yearly rent, or other profits as is now reserved or yielded for the same, be reserved." This clause alone had been sufficient to make good the lease (pursuing the power in other things) without making the lease conditional. Secondly, There is an express clause immediately ensuing, "that the Earl of Suffolk and Lord Howard, and their heirs, shall stand seised of the premises so leased, to the use of such lessees according to the tenor of such grants or leases," and afterwards to the former uses. This second clause, when the lease is made, makes it complete, according to the tenor of the lease. But the lease hath no clause of limitation or cessation for non-payment, and therefore it ceaseth not for non-payment.

It is true there is a third clause, *ex abundanti*, "that the covenanted fine and assurances shall be to the use of such lessees, *so as* they pay the said rent:" but the lease being made good by the two precedent clauses, without such limitation, I do not see any reason to make it subject to a limitation by this last clause, which is totally distinct from the rest, and begins with new words of covenant. Indeed, the usual course of

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assurances is to have the words of limitation annexed to the power, or at least to the clause that the conusees shall stand seised; which is not in our case.

But secondly: admitting the lease subject to this limitation, yet the difference which is taken in Ughtred's case holds clear in this, between an interest or estate to begin upon a condition, or act to be performed; and an estate or interest which passeth presently, and is to be defeated by matter *ex post facto*, on condition subsequent; in the latter case (which is ours) the defendant need not shew forth the performance of the condition, but the plaintiff must shew the breach of it. Ughtred's case, if it be considered, is far stronger. There an annuity was granted *pro exercitio officii*, which ceases if he do not execute; yet there in his count he need not aver the execution of it. There he was plaintiff who was to make his title; here he is only to defend: there it was in his count; here it is in a verdict.

On a special verdict with a general conclusion, the Court will doubt of no more than the jury doubt of.

But, thirdly; the conclusion of the jury in this special verdict, I conceive, excludes the bringing this in question. We are to doubt of no more than the jury doubt of. Their conclusion is, *si super totam materiam per Juratores in formâ prædictâ compertam*, the Justices shall conceive that the entry of White, the defendant, be not lawful, then they find for the plaintiff; not otherwise.

Now, whether this rent be paid or not, is not *materia per juratores comperta;* and therefore we must judge upon the matter as it is found; and if there be not other sufficient matter found by the jury for the Court to judge upon, the Court upon this verdict, (which is conditional, if, *super materiam compertam*, the Court shall hold the defendant's entry unlawful) it not appearing whether the rent was paid, or not paid, cannot give judgment for the plaintiff. (*b*)

So that, for all these reasons I conceive, notwithstanding this objection, the case remains entire, to be considered, *whether the lease made by Sir Thomas Howard to Mr. Villiers be pursuant to the power reserved to make leases.*

And for that, the case is this:—Elizabeth Ridgeley being lessee for forty years of the land in question at 26*s.* 8*d.* rent, Sir Charles Howard, being seised of the reversion of the premises *(inter alia)*, settles the same by indenture and fine, to the use of himself for life; remainder to his first and other

(*b*) This paragraph has been stopped and altered from the MS. which stands thus; "And if there be not other sufficient matter found by the jury for the Court to judge upon, *the plaintiff upon his verdict (which is conditional, if super totam materiam compertam, the Court shall hold the defendant's entry unlawful) it not appearing whether the rent were paid or not paid, cannot give judgment for the plaintiff.* "The passage in *italics* is of a hand-writing different from the rest of the manuscript.

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sons in tail; remainder to his brother Sir Robert Howard for life, and so to his first, second, and other sons in tail, with remainder over to other brothers for their lives; and with like limitation to their sons; with power to make leases to this effect: that it shall be lawful for Sir Charles, from time to time, during his life, and after his decease, for Sir Robert and the rest respectively, being lawfully seised, and lawful tenants of the freehold in possession of the said honours and premises, by virtue of any limitation of uses in that indenture limited, to make any lease of any part of the premises usually leased heretofore, or now in lease, whereof they or any of them respectively shall be lawfully seised, or be lawful tenants of the freehold in possession, unto any person or persons, for any term or terms of years, or life or lives; so as such estate and term exceed not the number of twenty-one years, or three lives in possession and remainder, or for any number of years determinable upon one, two, or three lives at the most; and so as the same be not made, by any covenant, grant, or clause, dispunishable of waste; and that so much yearly rent, or other profit, as is now reserved, yielded or paid respectively for the same, or more, be reserved.

Afterwards, Sir Charles dies without issue; Sir Robert Howard, during the continuance of the lease to Elizabeth Ridgeley, in 14 Car. 1. by indenture, leaseth the premises in question to Robert Villiers [under whom the defendant claims] *habendum* for ninety-nine years, if Robert Villiers so long live, the said term to begin by, from, and after the death or other determination of the estate which Elizabeth Ridgeley there had of and in the same, and not before; and *reddendo proinde* after the commencement of the term, and during the continuance thereof to the said Sir Robert Howard, his heirs and assigns, 26*s.* 8*d.* yearly [which was the ancient rent] at Michaelmas and Lady-day, by equal portions; with a clause of distress in case of non-payment after twenty-eight days.

Elizabeth Ridgeley's lease expires, Villiers enters; Sir Robert Howard having issue, Henry, the plaintiff's lessor, dies; Henry the lessor, pretending Villiers' lease not to be according to the power, enters, and makes the lease to the plaintiff; and the defendant as bailiff to Villiers re-enters.

So that the single question is, whether the lease made by Sir Robert Howard to Villiers be according to this power.

There have been several things objected against this lease, which may be reduced to these heads:—

1st, That these powers, tending to alter estates and disturb possessions settled by law, ought to be taken strictly, as powers of revocation, and conditions are. 6 Co. 33. Fitzwilliam's case. 3 Cr. 5.

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That being laid for a ground, they urge,

2dly, That when this lease to Villiers was made, Elizabeth Ridgeley was in possession; and that neither the letter nor the intent of the deed reach to give Sir Robert Howard power to make the lease before he were in possession.

3dly, If Sir Robert Howard have power to make a lease during Elizabeth Ridgeley's estate, yet the lease ought to be made to begin presently, as in case of concurrent leases. They are to be made to begin presently (as by way of estoppel between the parties) though they take not effect as to the possession, till the former lease expires; whereas this lease is limited not to begin till Ridgeley's lease be ended.

4thly, Sir Robert being but tenant for life, this reservation of the rent, which ought to go to those in remainder, being to him, his heirs and assigns, is not good; for, though the lessor in truth be his heir, yet his estate he hath not as heir, but as a stranger, by virtue of his remainder; and so cannot take the rent upon this reservation.

Notwithstanding all these objections, I hold this to be a good lease, pursuant to the power.

Powers reserved upon settlements of estates by way of use are to be taken favourably, and not strictly.

And, first, I consider these powers, which are reserved upon settlements of estates by way of use, are to be taken favourably and not strictly (*c*); he who limits and creates them, at the same time, had a full power over the estate, and might give it in what manner he pleased; and commonly (as in our case) the power is reserved to him who created it;—*cujus est dare, ejus est disponere.*

Powers of revoking upon conveyances to uses, of limiting new uses or estates, or creating estates, and the like, had their original from the statute of 27 H. VIII. of Uses. At first many doubts were made upon them; and it was said they should be taken strictly.

These powers of revoking upon conveyances to uses, of limiting new uses or estates, or creating estates, and the like, had their birth and original from the statute of 27 H. 8. of uses. At first they were strangers in the law; and, therefore, were looked upon, as strangers, with a more severe eye, and many doubts and questions were made upon them; and it was said they should be taken strictly. But it was well said in Chud-

(*c*) Otherwise the Touchstone, 269; but see 526 (l). 6th edition. The point in the former passage seems to be incorrect. See Appendix, F. where it is attempted to prove, by the citation of early cases, from manuscripts in the British Museum, that concurrent leases may be granted under certain private powers, as well as under the statute of 1 Eliz. c. 19. s. 5. But see Sugden on Powers, 599 (*x*).

leigh's case, by the Chief Baron, "That uses extended themselves into many branches. And he compared them to Nebuchadnezzar's tree; for in this tree the fowls of the heaven build their nests; and the nobility and gentry of the realm settle and establish their families; and under this tree *et oves, et boves, et cetera pecora campi*, a great part of the farmers and lessees of the land, do lie for shelter and safety." Certainly, it is most true of this great branch of the tree of uses, this of powers: they are almost in all conveyances, and a great part of the estates in the kingdom depend upon them; and, therefore, being grown so general, they now come to be favoured by the law.

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1 Co. 134.
Powers being grown general, theyare come to be favoured by the law.

Powers of revocation, and powers of creating new estates and leases, are of the same original: indeed, of the two powers of revocation seem to be the less favoured; yet now we construe them, not as conditions, but more as limitations; and my Lord Coke expressly saith, "That these revocations are favourably interpreted, because many men's inheritances depend upon them." Accordingly also powers to make leases, whensoever the execution of them hath come in question, have had a liberal and favourable construction; for they are not to be considered as bare and naked authorities, which are to be taken strictly: but they savour and relish of the estate and interest in the land, and depend upon the estate in it. *If tenant for life, who hath such power, depart with his estate, his power is gone*; the estate which is executed by the power is raised, not only out of the power, but partly out of the estate of the tenant for life. Therefore, if tenant for life, who hath such a power to make leases, grant a rent-charge, or acknowledge a statute; and after make a lease according to his power, the lessee, (as some hold), (*e*) shall be subject to such grant of a rent, or to such statute; and, therefore, because these powers have such a dependency upon the estate, they are not reckoned as bare authorities, or taken strictly, but have a more favourable and benign interpretation. He that hath a power to make leases for three lives, may make them for two lives: he that hath power to revoke, may do it for part at one time, part at

Powers of revocation and powers of creating new estates and leases are of the same original.
Of the two, powers of revocation seem to be the less favoured.
We now construe them not as conditions, but as limitations.
Co. L. 237. a.
So powers to make leases have a liberal construction.
Bare authorities are to be taken strictly.
If tenant for life, who hath power to make leases, depart with his estate, his power is gone.
Dale *v.* Sacheverell.

If he grant a rent-charge, or acknowledge a statute, and after make a lease, according to his power, the lessee (as some hold) shall be subject thereto.

He who hath a power to make leases for three lives, may make them for two lives.

He that hath power to revoke may do it for part at one time, part at another.

(*e*) See Grange *v.* Tiving, in these Reports; Sugden on Powers, P. 52, 53. and Roper's Law of Husband and Wife, Vol. II. 104.

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another; so that they are not to be measured or compared with bare authorities (*f*).

The words of powers make the law.

This being premised: as to the first objection, that Sir Robert Howard could not make this lease, because he was not tenant in possession, but Elizabeth Ridgeley was then tenant in possession: the words of the power itself, (which make the law in these cases) are to be considered. The words are,—

> "Provided that it shall and may be lawful for Sir Charles Howard, at all times, and from time to time during his life, and after his decease to and for Sir Robert Howard, Sir Edward Howard, &c. (naming all the rest in remainder) respectively being lawfully seised, and lawful tenant of the freehold in possession of the said honour, manor, and premises, by virtue of any limitation of use, by these presents before limited, at all times, and from time to time to make any lease or grant of any part of the premises usually leased heretofore, or now in lease, whereof they or any of them respectively shall be lawfully seised, or be lawful tenants of the freehold in possession, to any person or persons, for any term or terms of years, or life or lives, so as, &c."

By the words of this power he that is qualified to make the lease is not tied to be in possession of the land, but in possession of the freehold of the land; and to shew there is no mistake in it, the words are repeated twice in the proviso—"being lawfully seised, and lawful tenant of the freehold in possession."

Different kinds of possession distinguished.

It is well said, in Throckmorton and Tracy's case, Com. fol. 145. (*g*). There are several degrees in the estate of the land; there is a possession, and there is a reversion or remainder. There is a possession, reversion, and remainder of the land; and there is a possession, reversion, or remainder, of the freehold of the land; one may have the possession (the actual possession) of the land, and another have the possession (the actual possession) of the freehold of the

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(*f*) So under the power in 1 Eliz. c. 19. to Bishops, it seems that part of twenty-one years may be granted at one time, and part at another. See Peryam's judgment, in Fox and Collier, from MSS. in Appendix, F. and on the same principle, the term may so be divided into several parts. In Shaw *v.* Summers, 3 Moore, 196. a power to trustees to let land for any term not exceeding twenty-one years was executed at two different times, and the second lease was adjudged to be void. *Query*, If on the special wording power.

(*g*) Plowden, p. 162.

land. For instance, if J. S. make a lease for forty years to A., who enters; A. hath the possession of the land; J. S. hath possession still of the freehold; and so actually, that if A. his lessee be ousted, he shall bring an assise as being disseised, that is, actually ousted of his freehold. Then, suppose J. S. having this reversion expectant upon the lease for years to A. convey it to the use of B. for life, and after to the use of C. for life, and after to the use of the right heirs of D.; here are four several degrees in the estate of the land: A., the lessee, hath the actual possession of the land: B., the first in remainder, hath the freehold (the actual freehold) in possession of the land, though not the actual possession of the land; C. has the freehold in remainder, though not the freehold in possession, yet this estate in the freehold is *in esse*, and he hath it actually to grant, forfeit, surrender, and to other purposes, though he hath not actually the possession of it; but the right heirs of D. (he being living) have no estate in possession, reversion, or remainder of the freehold, till the contingency happen.

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So if a lease for life be made, and the lessor grant the reversion for years; the grantee (after attornment (*h*)) is in actual possession of the reversion, and shall have the rent. So that it is apparent there is a possession of the land, and a possession of the freehold of the land. Then by the words of qualification he that is lawfully seised [and so was Sir Robert Howard,] and lawful tenant of the freehold in possession [and so was Sir Robert Howard,] is enabled to make a lease. It is not that he that is lawful tenant in possession, but he that is lawful tenant of the freehold in possession, is enabled to make the lease.

These cases of powers (as I said before) are to be taken favourably, and most largely and beneficially, for him that hath the power; and, therefore, there is no reason to straiten the power contrary to the express words.

And methinks, not only the letter, but the intent and reason of this conveyance, are agreeable to this construction. Sir Charles, from whom the estate moved, had power to dispose of the reversion expectant upon Ridgeley's lease as he pleased. When he made this conveyance, the estate was in lease: it does not appear that he had any intent to abridge his own power, but rather the contrary. It is to be observed that the words in the power as to Sir Charles differ in the penning from the power to others. It is, "that it shall be lawful for Sir Charles, at all times during his life, to make leases;" and as to Sir Robert and the rest, it is, "when they shall be lawfully seised, and lawful te-

(*h*) 4 Ann. c. 16. s. 9. has rendered attornment here unnecessary.

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nant of the freehold in possession, to make leases." It is true, it concludes alike for Sir Charles and the rest, "that the leases must be made of such part of the premises whereof they shall be lawfully seised, or be lawful tenants of the freehold in possession;" which was necessary as well to Sir Charles, as the rest; it being the intent that where the freehold was in another, the lease should not be made by any of them: but to my sense, this different penning in the beginning of the clause shews they took it for granted, that notwithstanding Sir Charles had made leases for years, and so had but a reversion, yet he would be still, after this settlement, lawful tenant of the freehold in possession, according to the intent of this proviso, and therefore they omitted in the power unto him, but as to the rest they added it; that so, when they were qualified as Sir Charles was, [that is, to have the immediate freehold,] they might be enabled to make leases as he was. And if as to Sir Charles, from whom the estate moved, the power ought to be taken largely, and favourably, the same power, being limited to the rest so qualified, ought to have the same construction.

It stands with the reason of law to consider and weigh the nature of the estate at the time of creating the power; if the estate in which the power is executable were in possession or in reversion, construction is to be made *aliter, et aliter* where the words of the power are indefinite and general. 6 Co. 33. Leases in reversion under indefinite power, when restrained; when not restrained; and how they must take effect. Concurrent leases.

And it stands with the reason of law to consider, and weigh, the nature of the estate at the time of *creating* (*i*) the power; if the estate upon which the power is executable were in possession; or, if it were in reversion, construction is to be made *aliter, et aliter* where the words of the power are indefinite and general, (as in our case it is.) In Leaper and Wroth's case, cited in Fitzwilliam's case, (of which I shall have occasion to speak more upon the next point) it is agreed, if a man have a power to make leases for twenty-one years indefinitely, without a restraint to make them in possession, yet he cannot make a lease in reversion, or to take effect at a day to come; for he *may* make it to take effect in possession.

But suppose that at the time of such a general indefinite power created, the estate was only an estate in reversion expectant upon another for years or lives, as our case was; there, I conceive, he may make a lease presently after the power created, though the former lease was in being; for it was a reversion when it was settled; and as a reversion upon such a power, he may lease it. But, indeed, such a lease, though it take effect in point of interest *de futuro*, yet it must be made to begin presently, as in case of a concurrent lease of a bishop. And this, as Justice Jones said in the argument of Evans *v.*

(*i*) "Executing" in manuscript.

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F. 174. (*l*)

Ayscough (*j*) (Askwith's case,) 3 Car. 1. was put by Popham to be agreed in the Marquess of Northampton's case; it is implied in the report of *Shecomb and Hawkin's case*, 2 *Cro.* 319. (*k*)

And so in our case at the time of the estate settled, and power created, the estate subject to the power was but a reversion, and the power shall receive a construction suitable, it being general, and indefinite, and not restrained to the possession of the land, "that he who hath the possession of the freehold," though not of the law, may make a lease to begin presently, though it cannot take effect in possession during the former lease.

I have done with this point: I conceive Sir Robert Howard, at the time of this lease made, was tenant of the freehold in possession; and so, enabled to make the lease if he, in making the lease, do pursue the power in the other circumstances prescribed. And that brings me to the consideration of the next objection; which is,—

That this lease to Robert Villiers is not made to begin presently, but "to begin by, from, and after the death, or other determination of the estate of Elizabeth Ridgeley;" and the *reddendum* of the rent is, "*post inceptionem ejusdem termini et durante continuatione inde.*" And, therefore, it is urged, this lease is not pursuant to the power, which enables not Sir Robert to make a lease to begin at a day to come. Though it be admitted he may make it during Elizabeth Ridgeley's lease, yet in the limitation of it, the lease ought to be made to begin presently.

In answer to this objection, we must again resort to the words of the proviso. They give power to "Sir Robert, being lawful tenant of the freehold in possession, to make a lease of any part of the premises, whereof he shall be lawful tenant of the freehold in possession, to any person or persons, for any term or terms of years, or life or lives, so as such estate and term exceed not the number of twenty-one years, or three lives in possession and remainder; or for any number of years determinable upon one, two or three lives at the most; and so as the same be not made by any covenant, grant, or

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(*j*) See Appendix F. for a statement of the case of Evans and Askwith from several early manuscripts which explain the printed reports.

(*k*) The words in *italic* and figures are supplied to a blank in the manuscript.

(*l*) This marginal note seems to be to the book which is referred to in No. 38, of Mr. Hargrave's collection, fol. 159. b., where the reference is "Nota lib. F. 226. a." Similar references will be observed in other places in this volume.

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clause, dispunishable of waste; and that so much yearly rent or other profits as is now reserved, yielded, or paid respectively for the same or more be reserved; with a clause declaratory that the fines and other covenanted assurances shall be, and the conusees, &c. shall stand and be seised of such and so much of the premises as shall be so demised to the use of such lessees for the terms for which such demises shall be made, so as such lessees, their executors and assigns, shall and do, severally and respectively, yearly yield and pay to such persons to whom the reversion or remainder of the premises, so happening to be leased, shall for the time being appertain, the yearly rent or rents, or other duties and services in or by such lease reserved, and at the days and times, and in such sort as in or by such lease shall be in that behalf limited."

Where there is a power to make any leases for twenty-one years or three lives; though the words mention not, whether such leases shall be in possession or reversion, nor restrain the power, yet a lease cannot be made at a day to come by such an indefinite power, although the lands be in lease at the creation of the power. 6 Co. 33. Fitzwilliam's case, 3 Cr. 5. 8 Co. 70.

The power, we see, is a general indefinite power (before the *so* or *ita quod)* to make any leases for any term of years or lives; and though in the letter of it, it extends to leases in reversion as well as in possession, for it is to make any leases for any terms, yet I must agree, if there be no more in the case, it will not enable to make leases to begin at a day to come. And as to that purpose it is no more than if the power had been to make any leases for twenty-one years, or three lives; though the words mention not whether such leases shall be in possession, or reversion, nor restrain the power, yet a lease cannot be made at a day to come by such an indefinite power; that is, the express case of Leper and Wroth which I cited before. Therefore in Whitlock's case, the general power (before the *ita quod* or restraint) is not indefinitely, to make any leases, as it is in our case; but any leases "*tam in possessione quam in reversione*;" and by virtue of that power the lease in reversion was good, which otherwise it would not have been.

2 Cr. 318. Yelverton 222.

And the case Hil. 10 Jac. B. R., which in Croke's Reports goes by the name of Shecomb against Hawkins, is express in the point; there being a lease for years in being, (as it was in our case), Mrs. Luttrel, the reversioner, settles the land upon herself for life, with remainders over, with a power for her, at any time, to make leases for twenty-one years. Before the old lease expired, she made a lease for twenty-one years, *to begin after the determination of that former lease*; and it was adjudged naught, for it ought to have been a lease in possession.

And if the power should be construed otherwise, to enable

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the making of reversionary leases, there might be lease upon lease *in infinitum*; and therefore such indefinite words in powers are by construction of law bounded and limited, where the party himself doth not bind or restrain them. They are but as agreements between the parties, and expounded as other covenants and agreements are.

Indefinite words in powers (as that tenant for life may at any time make leases for twenty-one years), are by construction of law bounded. They are but as agreements between the parties, and expounded as other covenants and agreements are.

That is the true reason of Leper and Wroth's case, where the power was to make leases for twenty-one years. A lease for twenty-one years, to begin at Michaelmas next, is not, by construction of law, pursuant to that power; for if I be bound to you, or covenant with you, to make you a lease for twenty-one years indefinitely, the lease ought to be made presently, and must not commence *in futuro*. So if a custom be, that a copyholder of inheritance may make a lease for twenty-one years, he cannot make a lease for twenty-one years to commence at a day to come.

The law makes a reasonable exposition of those agreements and customs which are set forth indefinitely; and that was the true reason of the resolution in Leper and Wroth's case, and Shecomb's case before cited; and not that those powers are to be taken strictly; for they receive the same interpretation which contracts and agreements between parties do, which ought to have a reasonable intendment.

The law makes a reasonable exposition of agreements and customs set forth indefinitely.

And even in that case of Leper and Wroth, it was agreed (as I have it in a good report of that case) that though the power was indefinite, *to make leases for twenty-one years*, without the words *toties quoties*; yet when one lease, so made, was expired, the lessor by virtue of his power might make another lease in possession, though he could not make a reversionary lease; which shews that these powers were not taken strictly.

But thus far I must agree in our principal case, these general indefinite words—"*to make any leases for any terms of years or lives of themselves*,"—are not sufficient to enable this lease made to Robert Villiers, which is limited to commence after the expiration of the former lease.

But that whereupon I ground myself is this, and by virtue whereof, I take it, this lease is made good, *viz.* the words that follow this indefinite power. The power is, "to make leases for any term or terms of years, or life or lives *(ita quod)* so as such estate and term exceed not the number of twenty-one years or three lives in possession and remainder."

This *ita quod*, or *so as*, is not only a clause of restraint, but also a clause of explanation of the power, which was in-

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definitely expressed before. The law, indeed, would have explained it if the party had not done so; but his intention appearing that he meant the power should extend to leases in remainder, so they exceeded not twenty-one years, the law will not make contrary exposition, *where the words will bear it as largely as the party explains it.*

The law will explain general words in instruments: but where the party has expressed in other parts thereof what his meaning is, the law will not make contrary exposition, if the words will bear it as largely as the party explains it.

8 Co. 70.

That is the reason of the common cases.

If I, by deed, give an advowson, or other thing which passeth by grant, to J. S. indefinitely, the law will bound it, and limit it for life: but if in the *habendum* I restrain it, or enlarge it, (nay, though it be by a void limitation,) the law will not make any construction but such as my words carry. And that is the difference here very obviously (which to another purpose is taken in Whitlock's case) between a particular power affirmative: as if the power here had been to have made leases in possession for twenty-one years, the "*ita quod*" after could not explain it to extend to leases in reversion; and a general indefinite power restrained with an "*ita quod*," as in our case the power is, indefinitely, *to make leases for lives or years*, the words in the generality of them exclude not, but may take in and comprehend leases in reversion; and therefore the "*ita quod*," or "so as," restraining and bounding this indefinite power, "that he may lease, so as it exceed not twenty-one years, or three lives in possession and remainder," implies, and so explains the power, that he may make a lease for twenty-one years, in remainder, as well as in possession, so as it exceed not twenty-one years, or three lives.

An indefinite power to lease for lives or years, so as upon every lease to be made in possession the old rent be reserved, and on every lease in reversion, double the old rent be reserved, will justify the granting of leases in reversion.

Com. Throckmorton and Tracy's case.

Suppose the power had been, as it is here, indefinite *to make leases for lives or years, so as upon every lease to be made in possession the old rent be reserved; and upon every lease in reversion, or remainder, double the old rent be reserved;*— would any man doubt but this had been a sufficient implication and explanation of the power, that he might make such a lease in reversion?

So it is here: he may make an estate in remainder, not exceeding three lives; and so he hath done here; this lease to Villiers is such an estate in remainder. It is to begin from the determination of the former lease; it is for ninety-nine years, if Villiers so long live; and therefore doth not exceed three lives; and therefore is pursuant to the power.

"Remainder" construed in a grammatical sense.

If it should be objected that this is not a remainder, but a future interest in Villiers, and by the "*ita quod*" the leases ought to be in possession or remainder, it receives a clear answer; for first, it is a remainder, in the grammatical construction; it is a remainder, in the vulgar acceptation. He that hath a future interest hath a remainder; that is, the land is to remain to

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him after the particular precedent estate determined. Nay, nothing else can be meant here by a lease in remainder; for a legal remainder is that which commences at the same time with the particular estate, which this remainder by virtue of this power cannot do; he cannot make a lease for twenty-one years, to begin after twenty-one years, by virtue of this power. He cannot make a lease for life, remainder for life; for that were to make an estate dispunishable of waste, which is expressly prohibited in this very power; so that it must be construed of such a remainder as is a future interest.

And so it was in Whitlock's case:—the power was to make leases in possession and reversion; a future interest was taken by admittance to be a lease in reversion within the power, and the law expounds remainder and reversion as one and the same thing in common acceptation; though not in pleading, yet in fines and grants; and therefore if a fine be levied of a reversion, the writ of covenant is of the land, and the concord is, "*recognovit tenementa prædicta esse jus ipsius R. et concessit per se et hæredibus suis quod tenementa prædicta quæ H. tenuit ad terminum vitæ suæ, et quæ post decessum ipsius H. ad le consor et hæredes suos debuerunt reverti, post decessum ipsius H. remaneant præfato R. et hæredibus suis.*" *Com.* 157.

The law expounds remainder and reversion as one and the same thing in common acceptation; though not in pleading, yet in fines and grants.

If it should be objected (for this matter not having been much pressed before, I am willing to raise all the objections I can) that the words of restraint of the power being—"so as such estate exceed not twenty-one years or three lives in possession and remainder,"—it shall be construed that the estate in possession and remainder shall not exceed twenty-one years or three lives; and here if the estate to Elizabeth Ridgeley for ten years (so much then remaining of the forty years) and the estate of Mr. Villiers for ninety-nine years if he so long live, to commence after the end of her lease, exceed in possibility twenty-one years or three lives, for it is in effect for one life and ten years; I do agree that a lease for one life and ten years is not within the power; for the estate must be such as exceeds not three lives or twenty-one years. It is in the disjunctive; such an estate *or* estates, made by one who hath the power, cannot be good; for the ten years, and a life may exceed three lives or twenty-one years; and if by possibility they may do so, though *in facto* they do not, it will not amend the matter.

Construction must be made with reference to what events may arise, not to what actually have arisen.

But the answer to the objection is easy. The "*ita quod*," or "so as," reaches not to the estates of the land, but to the estates by virtue of the power. They have power to make leases, "so as such leases exceed not twenty-one years or three lives." What leases? Why such as are made by virtue of the power, which excludes Elizabeth Ridgeley's lease, which

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was made before the power created; and, as I said before, we must look upon the estate as it was at the time when the power was created. It was an estate in reversion; and of this estate, thus in reversion, this power is created: the estate which Elizabeth Ridgeley had comes not at all within the consideration of this power.

There is one thing more which I cannot call an objection: it is not worth the name; but I must mention it. The "*ita quod*" is in the copulative, in possession *and* remainder; and this estate is a remainder alone. If it should be thought worthy an answer, it is answered that the words "and" for "or," and "or" for "and," are frequently construed in law according to the subject matter. The words "in possession and remainder" must be here taken distributively, or otherwise no estate could be made in possession alone; for the objection is the same upon the words being copulative "possession and remainder," which expression would be absurd. The power in Whitlock's case is to make leases "*tam in possessione quam in reversione:*" the same objection, and with as much reason, might have been made against the lease there, because it was in reversion only; for "*tam quam*" literally implies both.

The words "and" for "or" and "or" for "and" are frequently construed in law according to the subject matter.

The truth is, Whitlock's principal case, if well considered, rules and determines the point we have in hand. There was a lease for the life of Joan Bulhead in being, in our case a lease for years. Whitlock, the reversioner, settles it to the use of himself for life, with remainder over; wherein there is a power for him to make leases *tam in possessione quam reversione*;—"provided that such leases should not exceed above three lives, or twenty-one years; and so as upon every such lease the ancient rents be reserved payable during the said lease." And after, he makes a lease to Christian Herne, *habendum* for ninety-nine years if she and Peter Rattenbury, or either of them, so long live, the term to commence after the death of Joan Bulhead, rendering after the beginning of the term 14*s.* and so forth.

This future interest was in that case adjudged good.

There is no difference between that power and ours, but that the general power there was to make leases "*tam in possessione quam in reversione.*" The general power in our case is, *to make leases* indefinitely: but being explained in the "*ita quod,*" to extend to leases as well in possession as remainder, so as they exceed not twenty-one years or three lives, I take it strongly to be the same as if it had been in the body of the power; and thus the other point, that a lease for ninety-nine years, if Villiers so long live, exceeds not three lives, or twenty-one years, is the same case with Whitlock's lease, and one of the points resolved in that case.

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There hath been one objection mainly urged in this case; that is, if Sir Robert Howard, or he who hath the power, may once make leases also in reversion or remainder; he, or those who come to have the power after him, may make leases also in reversion or remainder; and so lease may be made upon lease *in infinitum*, so as every lease exceed not three lives, or twenty-one years; and there may be many leases of twenty-one years after twenty-one years, or many leases determinable upon three lives, every one of several men's lives: and so, in effect, destroy the interest of those others in remainder.

To this I give this answer: First, that if the power extend to leases in remainder, if the power will carry it to a remainder after a remainder, or to one lease after another, no man hath cause to find fault with it; he from whom it first moved might give it upon what powers or limitations he pleased. The same objection might be made in Whitlock's case, where the power was to lease *tam in possessione quam in reversione*. But indeed where the power is indefinite, and nothing appears of any intention to make leases in remainder or reversion (as in Leper and Wroth's case) there it was urged as a good objection if you extend it to a future interest, that, by the same reason, you may by the letter extend it to lease upon lease; because he had power from time to time to lease; and that did not seem agreeable to the intent of the parties. But where the intent is apparent, to give a power to make leases in remainder or reversion, and from time to time, it is otherwise. The powers have been frequent of late times for tenant for life to have power to make leases not exceeding two thousand years; nay, to make estates in tail, or any other particular estates. And by the power which bishops have at this day, notwithstanding any statute restraining them, they may make concurrent leases, lease upon lease, every year, for twenty years together, so there be none in being at once exceeding twenty-one years.

Bishops may make concurrent leases, lease upon lease, every year, for twenty years together, so there be none in being at once exceeding twenty-one years.

But, secondly, for my own opinion, I conceive it shall be enough that by virtue of this power he that hath made such a lease in reversion or remainder, as long as that continue but a reversion or remainder, cannot make another lease in reversion or remainder upon it, if it, together with all the estates in possession and remainder, made before by virtue of the power, shall exceed the number of twenty-years, or three lives, in possession or remainder; for that is the *terminus ultra quem* they cannot go, by virtue of the power, as I conceive; and the words, "so as such estate and term (in the singular number) exceed not twenty-one years or three lives, in possession or remainder," must be taken collectively for such estate and

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terms in the plural number, for so are the words precedent, "any term or terms." And, secondly, "estate in possession and remainder" cannot be properly understood but of two estates; and, therefore, in a reasonable construction, the power may be construed to be confined, not to be executed, beyond twenty-one years, or three lives in the whole, both in possession and remainder. And I observe, both in this case and in Whitlock's case, the reversionary lease is to take effect in possession; and if our lease had been to have had another commencement, as from Michaelmas next after the former lease determined, so that there had been an interval (*m*) between the first and the second lease, I doubt whether it would have been good by virtue of either power, which intend a remainder or reversion upon that which was precedent. But the power, I conceive, here is to make leases in possession and in remainder; so as all leases so made by virtue of the power in possession and remainder, by whomsoever made, exceed not twenty-one years or three lives: and if so, such a power is but usual. In the settlements of western estates, (*n*) it is usual to reserve powers to make leases for three lives in reversion of one in possession; or two lives in reversion upon two in possession; which is a greater power than this in question. But be the law as it will be in such case where a reversionary lease is made after a reversionary lease; yet in our case, it being but a single lease in remainder agreeable to the words of the power, I hold as to this point also, that the lease is good; for it doth not exceed the number of three lives in remainder.

There are, indeed, two restraints of the power; the one, that which we have spoken of, and within which as I conceive this lease stands good, (the power is, to lease for any term or lives, so as it exceed not twenty-one years or three lives, in possession and remainder;) the other is, or for any number of years, determinable upon one, two or three lives at the most; which last clause extends only to leases in possession. It is very true, this last is but a tautology, and implied in the former; for he that may make a lease for any term not exceeding twenty-one years or three lives, may make a lease for any number of years determinable upon one, two or three lives, as it is expressly resolved in Whitlock's case; and, therefore, that here is put in *ex abundanti cautela*, but takes not away the other

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(*m*) Holt, C. J. seems to have thought this point material; Sugden on Powers 586, from 2 Osborn's MSS. p. 112, in Lincoln's Inn library. So in the same library in 3 Leed's MSS. p. 117; and there Coventry *v.* Coventry, relied on by Mr. Sugden on Powers 584. is said not to have been decided. And see Appendix F.

(*n*) So said in Comyn; Rep. 41, 7 T. R. 723; and 7 Price 398.

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power. So that, for the reasons beforementioned, I hold this lease to Mr. Villiers is good, notwithstanding it be limited to commence upon the expiration of the former lease.

The last objection to this lease is, that the rent is not reserved according to the power; for it is reserved to Sir Robert, his heirs and assigns. And Sir Robert's heirs as heir cannot have it; he in the remainder must have it, though he be not heir or assign; and though he that is in remainder falls out to be heir, yet he takes it not as heir; and perhaps after, it may come to another in remainder before the term end, who will not be heir to Sir Robert. The like objection was made in Whitlock's case, where the rent was reserved to "him, his heirs and assigns, and to such persons to whom the inheritance after his death should appertain;" and adjudged to be a good reservation.

But the reason of that reservation makes the great doubt in this case; for it is there said, where Whitlock reserved the rent to him, his heirs and assigns, this by construction of law precedes the limitation of uses; and hath its essence out of the fine; and is all one as if it had been originally limited to the lessee for the term; and so was well reserved to him, his heirs and assigns; and is well transferred to every one to whom any use is limited. The reason holds well in that case, for Whitlock who made the lease made the settlement; and, therefore, if (as the law makes construction) the lease was made before the remainders limited, then the rent was well reserved to him, his heirs and assigns; for he had the inheritance at the time of that reservation. But in our case Sir Charles Howard made the settlement, to whom Sir Robert is not heir; and, therefore, such a reservation to Sir Robert, his heirs and assigns, before the limitation of uses, had been naught. It is true, the estate, by virtue of the power, when it is raised, doth to some purposes precede the limitation of uses: but it is not raised unless the rent be rightly reserved; for it is part of the proviso or power, that the ancient rent be reserved; and the declaratory clause is, that the conusees shall stand seised to the use of such lessees, so as they pay their rents to such persons to whom the reversion or remainder shall appertain." And how can they pay it if it be not reserved? And put the case Sir Robert had reserved the rent to him, his executors and assigns, during the term; or to him and his wife during the term;—is this a good lease within the power? If it be not, why should it be good when it is reserved to his heirs, who have no more to do with it than his wife or executors?

I confess this objection (which I should have been glad had been pressed at the bar, that I might have had some light from

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thence) hath struck much with me; and the more because it is of very general concernment. Many great estates depend upon leases made by an eldest son, and others in remainder for life, who reserve the rents *in communi formâ*, to them, their heirs and assigns; and yet were not the persons who had the inheritance, and created the uses; but came in, as Sir Robert Howard in our case did, as a bare tenant for life, upon a limitation of use by others, who had the fee.

Where words of reservation of rent are sufficient to carry rent according to a power, there an addition contrary to it shall not vitiate the reservation; but the addition shall be void, *utile per inutile non vitiatur.*

But yet I hold such a reservation good enough; and I ground it upon this difference:—Where the words of reservation are sufficient to carry the rent according to the power, there the addition contrary to it shall not vitiate the reservation: but the addition shall be void, and the reservation good; for it appeared that the intent was to make an estate according to the power, and without which he could not make it; and then the rule holds, *utile per inutile non vitiatur.* That is our case: here are words enough in the reservation, for it is "*reddendo post inceptionem termini et durante continuatione inde* (that is, *reddendo durante termino prædicto*) 26*s.* 8*d. annuatim*," which was the old rent, at the usual times. These words alone had been clearly a good reservation [and indeed the best reservation, as is agreed in Whitlock's case,] to leave it to the construction of law; then the addition of these words, "to him, his heirs and assigns," being void in themselves, shall not vitiate the reservation, which is good without them. And to prove that an idle addition to such a power shall not vitiate that which is good, there was a notable case, Trin. 1649, Rot. 596. B. R. Chambers and Ferne's case. Sir William Kniveton had a power to grant a rent out of certain land *ad libitum:* he grants it payable at another place, and town, and at several days. It was urged that he had not pursued his power; for the implication of law is, that he shall pay it upon the land. But held it was good. For, first, the place of payment is but circumstantial: but, secondly, [for which I urge it] the body of the grant was good; and admit the limitation of payment shall be void, yet it shall be a good rent, *et utile per inutile non vitiatur.*

D. 789. (*o*) MS. (Hil. 14 Car. 1.) 221. S. C. (*p*)

And in Whitlock's case it is agreed, if the lessor reserve the rent to himself, and to every person to whom the reversion or inheritance of the premises shall appertain during the term, that is agreed to be good; for the reason, I said before, as I conceive, there were words sufficient in the reservation; for

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(*o*) An original note in the manuscript.

(*p*) Reference by Mr. Umfreville, the volume seems to be number forty-two of the collection in the museum; in which this passage of Bridgman's judgment is referred to; that report concludes that the Court doubted of the validity of the execution of the powers. See Appendix F.

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otherwise it is clearly nought; he cannot reserve a rent to a stranger; and before the uses created, such a reservation had been void. And upon that ground I hold, that if Sir Robert had reserved the rent to him, his executors and assigns, during the term; or to him and his wife, during the term; which are the cases that have been put; or to him during the term; the law would have rejected that which is void; and there being enough in the reservation to satisfy the words of the power, the law will construe such a reservation to be good.

In case of powers created by a statute law, we have several instances that an addition to it, though void in itself, shall not vitiate that which is good. The statute of 32 H. VIII. gives power to devise two parts of *capite* land. It was adjudged in Hyde and Hunton's case, 4 & 5 P. and M. 150. (*o*) that a devise of all his land shall not make it void for the whole. And so in Sir Richard Pexhall's case, upon the statute of 34 H. VIII. of Wills; a devise of a rent of 20*l.* out of all his *capite* lands, whereas that statute enables him to devise a rent only out of two parts; yet it was adjudged a good devise to charge the two parts, against the opinion in Butler and Baker's case (*p*): for, saith the book, "it shall be good for so much as the statute enables him unto, and void for the residue, *quia quando plus fit quam fieri debet, videtur etiam ipsum fieri quod faciendum est*: and because the statute enabled the devisor only to charge two parts, the devise of the whole is void to charge a third part," and yet it is good for the whole rent to charge the two parts.

8 Co. 84.

5 Co. 33. b.

The case of a power reserved to a person that hath an estate executed by the Statute of Uses is to be compared to these and the like cases, and not to a bare licence or authority by the common law, as I said before (*q*). But if the reservation have not words sufficient to satisfy the power, as if it be—"reserving the rent," and doth not say, "*durante termino prædicto*;" or reserve a less rent, or the like; there is not sufficient in the reservation to satisfy the power; and therefore the lease shall be void, and shall not be made good upon the reason, or supposal, in Whitlock's case; because, by presumption of law, the lease is created by the fine, and hath its essence out of it, and precedes the remainders: for that is a begging of the question; it is not a lease according to the power, nor is created by the fine, unless the rent be reserved by and according to the power.

(*q*) Dyer. See 3 Rep. 33. & 8 Rep. 168.—Sugden on Powers, c. 9. s. 8.

(*r*) 3 Rep. 33. Griffiths and Vere, 9 Ves. 134. Longdon *v.* Simson, 12 Vesey 297.

(*s*) Page 97.

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'Another reason may be given why this reservation to Sir Robert, his heirs and assigns, during the term, may be good, is, the words "his heirs and assigns" do not denote any person certain, as if he had reserved it to his wife or daughter, or the like; but properly intend only the duration of the estate in the rent; that is, for ever, so long as the estate lasts; and so *reddendo* to him, his heirs and assigns, *durante termino prædicto*," is no more than, "*reddendo durante termino prædicto.*" To that purpose there was a notable case in the Exchequer, in which I was of counsel, and my brother Hyde, between Garrett, lessee of Viscount Hereford, and Meyrick, for the manor of Monckton in Pembrokeshire. Robert, Earl of Essex, being tenant in tail, to him and the heirs males of the body of Walter, Viscount Hereford, his great grandfather, the reversion in the Crown, makes a lease for twenty-one years (as tenant in tail, though the reversion be in the Crown, may) rendering the ancient rent; the reservation was, "to him, his heirs and assigns, *durante termino prædicto*;" and then the Earl of Essex dies without issue, and the estate tail descends to Viscount Hereford, who was not heir to the Earl who made the lease, but the Duchess of Somerset and Sir Robert Shirley; and for that cause he would have avoided the lease. But it was adjudged against him upon an especial verdict, that the rent was well reserved, and would go to the Viscount, though not heir to the Earl who reserved it.

Tenant in tail may make a lease for 21 years, though the reversion be in the Crown.

But I rely not upon this reason, but principally upon the other reason: there are words in the reservation sufficient to agree with the power; and what is more shall be laid aside as void in itself, and superfluous, in the clause of reservation.

So that, upon the whole, I conclude Sir Robert Howard, when he made the lease, was qualified to make it: that the lease itself, though made to commence *in futuro*, was pursuant to the power; that the reservation of the rent, though it be not so formal as it should be, and hath more in it than it ought to have, yet is sufficient to carry the rent to those to whom the reservation or remainder shall appertain. And so judgment ought to be given for the defendant.

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Hil. 14° et 15° Car. II^di^ Rot. 2205.

(Power to revoke the uses of a settlement reserved to the settlor "or any of the heirs of his body," well executed by the heir of his body, *being a feme covert* and *an infant*; because it is for her benefit, and consistent with the intention of the settlement.)

Ebor. Hil. 14 & 15 Car. &c. Eject. *firmæ*, by Christopher Grange, against Fernando Tiving, of 40 acres of land, 40 acres of meadow, 40 acres of pasture, in Egbar, of the demise of William Palmer and Mary his wife, upon a special verdict. Harg. MS. No. 56. fol. 157.

THE CASE.

The case is but this: Bryant Stapleton by indenture covenants to stands seised to the use of himself for life, and after to the use of his wife and her heirs: "Provided that it shall be lawful for him during "his life, or to any of the heirs of his body, by his "or their last will in writing, or by any other writing "under his or their hand and seal, to revoke, alter or "change, all or any of the uses in the indenture, and "make void the said indenture; and to limit and de-"clare any other uses thereof, at his and their will "and pleasure."

Bryan Stapleton dies, having issue only a daughter, Mary, who marries with William Palmer; and after, at the age of nineteen years, by indenture under her hand and seal, but expressed to be with her husband's consent, revokes the uses; and limits the use to herself and her heirs; and the plaintiff's title is by lease from her and her husband.

This case, though it hath been branched out into several points, yet I think it rests upon one single question; that is, whether the coverture or infancy of Mary, who is heir of the body of Bryan Stapleton, do hinder her from executing the power of revocation, reserved upon the deed of uses *to him, or any of the heirs of his body, by writing under his or their hands and seals.*

(*a*) "Argued and adjudged, 26 Apr. 1665, 17 Car. 2." Harg. MSS. No. 56. fol. 157. This case does not appear to have been before reported. In the manuscript, fol. 156. *b.* is a reference for the record of the case to Sir Orlando's "Book of Reports, 553."

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It cannot be denied, but regularly by law, coverture or infancy debar the party, which is under the disability, from making any deed or writing, to dispose of any estate or interest. Littleton, sect. 259, saith,—*Before the age of twenty-one years, if an infant make any grant, obligation, deed, or other writing, all serves for nothing, and may be avoided.* And so it is of a feme covert; for a feme covert, by presumption of law, hath not the free use of her will, and an infant hath not free use of reason; and both will and understanding are required to a legal act.

Regularly by law, coverture or infancy debar the party from making any deed or writing to dispose of any estate or interest.

And this rule of the common law, as being grounded upon common reason, holds also in exposition of statutes. If a statute have general words, as the statute of 32 H. 8. of Wills; that all persons may devise, or may give to charitable uses, or that all grants made to King, &c. shall be good; these general words shall not enable an infant or feme covert.

General words in a statute do not enable contrary to rules of law.

Hob. 136.

And the same reason will hold also in the exposition of deeds; *quod generaliter dictum, generaliter est intelligendum*; regularly general words, as here the words are "heirs of the body of Bryan Stapleton" not determined to a particular person, heir of the body, whose age or qualification is known, shall have a general construction; and if such an heir be an infant or feme covert, these general words shall not enable him to dispose of an estate or interest, it requiring understanding and free will, which the law presumeth they have not; and, therefore, if a conveyance be to the use of J. S. and the heirs of his body, with power for him, or the heirs of his body, to make

In deeds, *quod generaliter dictum, generaliter est intelligendum.*

If a conveyance be to the use of J. S.

and the heirs of his body with power for him, or the heirs of his body, to make leases, the heir of his body, being a feme covert, *without her husband*, (*b*) or infant, cannot make such a lease, whilst the disability continues.

(*b*) The doctrine, that a married woman may execute every kind of power, without the concurrence of her husband (Sugden on Powers, 155, 156. 3d ed,) seems to require some qualification, Where the husband has an interest, and the power is general, as in the case mentioned in the text, it does not appear to have been decided by any subsequent authority, that the wife's sole act will bind that interest against his consent, unless the donor's intention to that effect can be inferred. It seems also to be essential to consider the effect of the execution of the power on the wife's own interest.

The cases on the point may require further examination.

In Daniel *v.* Upley, Latch. 39. and W. Jones 137; Gibbons *v.* Moulton, Finch 246; Bayley *v.* Warburton, 2 Com. 494; and Godolphin *v.* Godelphin, 1 Ves 21. the powers seem to be simply collateral, or bare authorities, or the husband had no interest.

In Churchill *v.* Dibben, and Wright *v.* Lord Cadogan, 2 Eden 239, the powers were specially worded, and Barnet *v.* Mann, 1 Ves. 157. relies on Roscommon *v.* Fowke, 6 B. P. C. 161. which was a case of a special power.

In Harris *v.* Graham, 1 Ro. Ab. 329. Travel *v.* Travel, cited 2 Ves. 191. and reported by the name of Sclator *v.* Travel, 3 Viner 427;

leases, the heir of his body, being a feme covert, *without her husband*, or infant, cannot make such a lease, whilst the disability continues; for the general words, heir of his body, shall not be construed to alter the rule or reason of the law, but must be understood of such an heir of his body, who hath by law reason and will to do such an act.

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But now, in case of a bare power or authority, where an infant or feme covert is used but as an instrument, or conduit pipe, by another who hath no such disability, though upon the act an alteration or transferring of an estate do follow, yet the law looks upon him from whom that power or authority is derived, not upon the weakness of the person acting by it; and therefore an infant may, as an attorney, give livery upon a feoffment; so may a feme covert, though it be to her own husband.

In case of a bare power, an infant, or a feme covert, may transfer an estate as an instrument or conduit pipe of one who is able—as an infant may give livery on a feoffment as an attorney; so may a feme covert, though it be to her own husband.

Bayley *v.* Warburton, 2 Com. 494; Rich *v.* Beaumont, 3 B. P. C. 308. and Tomlinson *v.* Dighton, the consent of the husband was given.

Lord Antrim *v.* Duke of Buckingham is so variously and so loosely noticed, 1 Ch. Ca. 18; 1 Sid. 101; 3 Salk. 276; 3 Freeman 168; 1 Ab. Eq. 343; Comyn Rep. 496; Harg. MSS. No. 174. fol. 57; that it is difficult to conclude upon what principle the decision against the lease was grounded. It does not appear to have been argued according to the suggestion of the Chief Baron; and the reports which state that the power was reserved to be executed by the Duchess of Buckingham, "*being sole*," seem to be incorrect. Those words would probably have prevented dispute, except in favour of the asserted creditor; but they are not to be found in the Register's book. The case was of reversionary lands, in which the husband had no interest; and it does not affect the present question; nor does evidence appear to have been read of creditor's being concerned: so that it only decides that a general power reserved to a woman of her own lands, but not in contemplation of marriage, cannot be exercised as against the remainder-man, even with the concurrence of her after-taken husband. The power must be considered a power in gross in the events which happened: but if the Duchess had lived to acquire the actual possession of the land, it seems that it would have been a power appendant. The case, therefore, may be considered an authority against the doctrine *said to be now settled*, as to the acts of a feme covert, donee of such powers, being valid. See the case from the Register's Book of the Court of Chancery in Appendix, G.

It is submitted that subsequent decisions have not contradicted this inference; and that the positions in the treatise alluded to (Sugden on Powers, c. 3. s. 1.) are laid down too widely. It seems to be material to consider, whether the donor of the power *intended* the wife to exercise it, notwithstanding coverture; and in that respect the facts of the marriage being had, or contemplated at the time of the donation, are, perhaps, *indicia* of intention. If no such intention can be shewn, the consent of the husband, *or other parties respectively interested*, either expressed or implied, seems to be essential to the due execution of powers, when not mere authorities, or simply collateral.

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So if *cestui que use* before the statute desired that his executors should sell his land, a feme covert or infant executor, so he be of age to be executor, may sell his land; and if he devise, his wife shall sell his land. Though she after take a husband, and so hath altered her condition, she may sell the land, and she may sell it to her husband; for in these cases the wife or infant were but instruments, the estate moved from him, and it shall be said the act of the devisor, or him who gave this authority.

10 H. 7. 20. 34 E. 3. *Cui in vita*, 19. C. C. 112. a.

Devise by A. to his widow "to dispose at her pleasure, and to give it one of her sons, which she pleaseth." If this be a power, the subsequent coverture of the widow does not disable it; and if a condition, it is a condition depending on the power to alien; and in neither case is the coverture, by law, an impediment.

And this was the true ground of the judgment in Daniel and Ubby's case, Latch. 9. 39. There was a devise to his wife to dispose at her pleasure, and to give it one of her sons, which she pleaseth; she marries again, and after takes another husband, and then conveyed it to a younger son. The Judges differed, whether she had only an interest for life, and an authority to give it to one of her sons in fee; or an interest in fee, with a condition, if she do alien, she shall alien to one of her sons, which she pleaseth. But they did all agree that this conveyance by her, though under coverture, to her younger son, was good; for if it were a power, the coverture did not disable it; and if it were a condition, it was a condition annexed, and depending upon her power to alien; for she was not compellable to alien, and in neither of the cases was her coverture by law an impediment to her.

But this case of Daniel and Ubby, though much pressed as full in the case, yet comes not home to our case in question; for the feme covert, who made the conveyance, had therein a bare authority; her son was wholly in by the devise of the father, not by any estate derived from her; for her own estate and interest ceased when she executed her power, and disposed it to her son; and the power was a power raised from the will of the devisor; for by the equity of the Statute of Wills, though not by the express words, such a power may be created, and it is a devise of the testator himself within that statute.

Equity of the Statute of Wills.

Devise of a power, or authority to sell land, is within the equity of the Statute of Wills. And held to be a good devise of the land itself within the letter of the

And Mich. 38 & 39 Eliz. C. B. Townsend against Walley, a devise of a power or authority to sell was adjudged within the equity of the Statute of Wills; and it is agreed to be good in our books, C. C. 113. *a*, and 1 Cr. 382, Howel and Barnes' case, that a devise of a power or authority is good. And Molineux's case, 2 Cro. 145, holds it to be a good devise of the land itself, within the letter of the Statute of Wills; for where the executor, who hath power to sell, sells the land, the vendee is in by the devisor; and it is in law a devise of the statute, and the vendee is in by the devisor.

land to the vendee. But in our case the power is raised by the Statute of Uses; and if it were reserved upon a feoffment, or other conveyance, which works by transmutation of possession, the power would have its efficacy and vigor from the estate of the feoffees, which the feoffor had antecedent to his feoffment to uses; and, therefore, if Daniel and Ubby's case had been, not by a devise, but by a feoffment to the use of himself for life, and after to the use of his wife for life, or immediately to the use of a feme sole for life, with power for her to dispose of the fee; if she take a husband, whether she may, during the coverture, dispose of the estate, deserves consideration, notwithstanding the resolution in that case.

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And as to the other cases put, where *cestui que use* devised that another should sell the land, the use then was a thing severed from the land, and it was a bare and naked power; and, therefore, the feoffment or release of him who had such a power to sell land did not extinguish or destroy it; neither did the infancy or coverture of the persons to whom that power was devised obstruct the sale. And the reason of law is the same if the devise had been that he or his heirs might sell; the infancy or coverture of the heir should not have hindered the sale in such case.

And so I conceive at this day if a man devise that I. S. a mere stranger, or his heirs shall sell the land, this being a mere power to which the equity of the statute of wills enables him, the feoffment or release of I. S., or the minority of his heir, it being a pure collateral naked power, shall not hinder the sale.

1 Co. 112. Albany's case, 15 H. 7. 11. Co. Litt. 265. Devise that I. S. (a mere stranger) or his heirs, shall sell land; it is mere power; the feoffment or release of I. S. or the minority of the heir, shall not hinder the sale.

But in our case this power of revocation and declaration of new uses, arising upon a conveyance to uses by virtue of the statute of uses is of another nature than those cases of naked authorities or powers, before put, upon devises and wills; and therefore requires a distinct consideration.

Powers in conveyance to uses, and powers in devises, distinguished.

The statute of 27 H. 8. having incorporated uses into possession, gave birth to these powers of revocation, declaration of new uses, granting estates by tenant for life, or other particular tenant, for other lives or other greater estates than they had themselves, limiting of jointures, granting of rents in fee, or for other greater estates other than grantors themselves had, and the like.

By the common law such powers could not be granted; and if I make a common law conveyance at this day, as for instance a feoffment to A. and his heirs, to the use of him and his heirs; or a lease for one thousand years, which needs not any limita-

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tion of use, with a proviso that it shall be lawful for me to revoke at my will and pleasure, or that I may limit a jointure, make leases, &c. they are void powers; for they cannot arise out of the common law estate, but must arise by the influx and co-operation of the statute of uses upon an estate.

Co. Litt. 237. a. Nature of powers.

And, therefore, *powers* (c) are *novum compositum*; they are of a mixed nature; something they partake of the nature of the legal estate of the land, something of the nature of an use; in some things they must have construction, as cases at common law; and in other things the construction must be according to equity, and the Courts of Chancery, whence they are by the stat. 27 H. 8. transplanted; and this not by any express words of this statute, but by necessity of reason, as after that the fees simple conditional were by the statute *de donis* turned into estates tail, it bred a great many consequential alterations in those estates, concerning escheats, forfeitures for felony or treason, discontinuances, warranties, leases, &c.; all which, as you may see notably in the case of Fines, were resolved according to the reason of law in like cases; sometimes resembling the case of baron and feme, sometimes of a bishop or dean and chapter, or abbot and convent; sometimes differing from all of them, not taking any one alone for the pattern.

3 Co. 88. b.

Construction of powers of revocation, with or without power to declare new uses. Co. Litt. 237. a.

And so the powers raised upon the statute of uses, as well as estates raised by that statute, have been expounded accordingly; for instance only in the powers in our principal case, a power of revocation is to some purposes construed as a condition; for it reduceth an estate back to him to whom it was first limited: but to some purposes it is construed as a limitation; for I may revoke part at one time, part at another. And if it be accompanied with a power to declare new uses (as most commonly such powers are) it varies more from the nature of a condition; for it revests not the estate to the party from whom it moved, as a condition doth, but vests it in others; and if it do return to him who revoked it, yet it returns to him in another manner; he is not in of the old estate, as in case of a condition; but he may be, as the case requires, in of the old use.

And yet, whereas the statute 33 H. 8. c. 20. gives *to the king as much benefit by attainder of treason as well of uses and rights, entries and conditions, &c. as if it had been done by parliament*; within the word condition, a power of revocation upon a covenant or feoffment to uses is comprehended,

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(c) The original manuscript is, "And therefore are *novum compositum*," to which Mr. Hargrave remarks, "Some word seems to be omitted here; perhaps it is the word powers."

and it shall be forfeited to the king; as it is agreed in Sir Francis Englefield's case, and the Duke of Norfolk's case there cited.

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So that we see (which is all I urge this for) that the construction of cases upon these powers is not tied to any one pattern, either wholly to follow the reason of estates at common law, nor yet wholly to follow the reason or law of uses as it was before the stat. 27 H. 8.

7 Co. 78. The construction of powers does not either wholly follow the reason of estates at common law, nor wholly the reason or law of uses before the stat. 27 H. 8.

And among powers themselves raised by the statute of uses, some powers shall be construed as naked authorities, others as savouring of an interest; some wherein personal disabilities shall hinder the execution of them, some wherein they shall not; all which have by the sages of the law been construed as the cases have occurred; as in the like case upon the statute *de donis*, according to the analogy of the reason of the common law, with the consideration had to the alteration made in the common law itself, and the reason of it, by the said statute of uses.

Construction of powers.

It is necessary, therefore, for the resolution of this case (not yet, as I think, resolved in any court of law) to consider the nature of this proviso.

Here is a covenant by indenture by Bryan Stapleton to stand seised to the use of himself for life, and after to the use of Margaret his wife, and her heirs. "Provided that it shall be lawful for him, at any time during his life, or to any of the heirs of his body, by his or their last will in writing, written in his or their lifetime, or by any other writing under his or their hand and seals, to revoke, alter, change, or determine all or any the use or uses in the said deed mentioned; and to make void the said deed; and to appoint, limit and declare any other use or uses thereof, at his or their wills and pleasures."

I conceive this proviso purports in it several powers: the first, a power of revocation; *viz.* to revoke the uses limited by the deed to himself and Mary his wife. And the words "revoke, alter, change, or determine," seem to be all synonymous in this place; for if the uses be "revoked," they are "altered, changed, and determined." An alteration by limiting new uses is not intended within this part of the proviso; for it is expressly within the other power, which is a power of declaring new uses, *viz.* to "appoint, limit, or declare other uses at his or their wills or pleasures."

There is a third power; that is, to make void the deed: but if that be taken literally, I hold it clearly void; for a man may make a deed void by a condition to it to defeat it as a

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common law defeasance of it. But a power to make void the deed cannot reach to this indenture, which was executed but to uses upon the indenture; and therefore either those words "to make void the deed" must be understood of making void the uses of the deed, and so it is synonymous with the rest; or else it is, *quoad hoc*, a void proviso.

10 Co. 143. Scrope's case.

For the other two powers, *viz.* to revoke, and declare new uses; they are clearly two distinct powers; though one act, in declaring new uses alone, may in some cases serve for both. And for the nature of them, they are in this proviso both personal acts, appropriated to the person of the covenantor, or his heirs. They cannot be done by another. If it were to pay money, to tender a ring, or the like, these may be done by another by their authority; and therefore are forfeitable within the statute of 33 H. 8. But to revoke or declare new uses by writing, under his or their hand and seal, requires a personal act (the hand-writing of him or his heirs); in the Duke of Norfolk's case it was a proviso, "If he shall be minded to alter and revoke the uses, and shall signify his mind in writing under hand and seal." There were two things inseparable from his person: his intent, and the signifying it under his hand and seal; and therefore was not forfeited. But in Moor's report of Englefield's case, 303, it is taken for granted that the requiring the writing to be under his hand and seal only makes it inseparable from the person, and not forfeitable, as well as the other, the being minded, and signifying his mind.

9 Co. Combe's case, 75. b. One act may execute two distinct powers.

7 Co. 13.

Secondly, I hold both these powers of revoking and declaring new uses savour and taste of the estate of the land; and are not wholly collateral, as was objected at the bar. A bare collateral power is like to an authority at the common law. If A. make a conveyance to uses, with power to B. to revoke, who had nothing to do with the land as owner, nor hath any thing in it by the limitation of the uses, this power is collateral (*c*) to the estate in the land; and B., whether infant or feme covert, might revoke, as I conceive; and if he were of full age, and make a feoffment, or release, this feoffment or release would not disable him from revoking, as Popham, Chief Justice, held in Digges' case. And the same reason is upon a disability in law by reason of infancy, or coverture. And I think the law is the same if it were a power collateral to B. or his heirs, who had nothing to do with the land, to revoke by writing, under

Collateral powers.

(*c*) Or, what is sometimes termed more strictly, "simply collateral," Co. Litt. 237. a. Sugden on Powers, Chap. I. s. 4. And see in the same treatise, Chap. I. s. 5. as to the extinguishment of the different kinds of powers.

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his or their hands. The heir, though he had been a disseisor, and made a feoffment, or had released; or though he were an infant, might revoke; because it was a bare power to be executed by the heir, not resulting from an interest in him, or his ancestor, or tending to prejudice him in interest. And this I think is warranted by the cases cited before of Daniel and Ubby; and 10 H. 7. c. 20.; and Co. C. 112.

But now in our case the power tastes or savours so much of the land that Bryan Stapleton, from whom the estate first moved, clearly might have released, or by fine or feoffment extinguished this power, as it is resolved in Albany's case, and agreed in Digge's case.

1 Co. 112 a. —— 174 a. A. conveys land to the use of B. and his heirs, with power of revocation, A. may release or extinguish this power. So if the power be reserved to A. and his heirs, it is extinguishable by the heirs of A. to whom it descends.

If a man convey land to the use of another and his heirs with power of revocation, reserving no estate to himself, he may release or extinguish this power, because the lands moved from him; and though in our case the heir of Bryan Stapleton never had any estate in the land, yet this power is derived to her as heir to her father who had the estate, and limited the use, and reserved this power; and whosoever claims by a new limitation, must claim under him who created the power; and if it be not a collateral power as to the father who reserved it, it shall not be to the heir to whom it descends. Besides it is not a mere collateral power in respect of the heir; for the consequence of this revocation is the reducing of the estate to herself. And the words of C. C. 237 a. are emphatical:—"if he that hath such a power of revocation have no present interest in the land, nor by the ceasor of the estate shall have nothing, then his feoffment or fine, &c. is no extinguishment of his power; because it is merely collateral to the land;" which fully implies that when the person who revokes gains by the ceasor of the estate revoked, it is not a mere collateral power, but extinguishable by feoffment or release, which is our case; for by the ceasor of the former use Mary will, or may if she please, have the land.

When the person who revokes gains by the ceasor of the estate revoked, it is not a mere collateral power, but extinguishable by feoffment.

Powers not collateral.

In the last place we are to consider that all powers that taste of the land, and are not collateral, are not of the like quality; some draw more from the estate and interest of the land than others.

If a conveyance be made to the use of J. S. for life, with power to make leases for three lives, rendering the old rent &c.; if he, according to his power, make a lease for three lives, this issues not only out of his power, but in some sort out of his estate; and therefore if he had granted a rent charge, or acknowledged a statute precedent to his lease for three lives, it should have stood good at least during his life,

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F. 69, Dale *v.* Sacheverell(*d*) See Com. Rep. 494. (*e*)

which it should not if it had been raised out of his power only; for then it had related to the time of the conveyance which was paramount to that incumbrance. And therefore in such a case a defect of age or coverture may be considerable.

If a man make a feoffment to the immediate use of J. S. for his life, who is then nineteen or twenty years old, and so of age of discretion, or to the use of Alice Stile, who is then a feme covert, with power to make leases for three lives, &c., I will not determine whether a lease according to that power executed by that infant, or feme covert, be good or not; for without all doubt it might have been so limited, by express words of the power, "that he might make such leases, whether he or she were within age, or of full age, or covert or sole;" and then it had clearly been good; for if he who was owner of the estate had no disability upon him, he might make use of any hand, how weak soever, to reach out that estate. But the question will be in that case, whether he who made that conveyance by naming the person, whom he then knew to be an infant or married, and giving an immediate estate, and an indefinite power to make leases, without restitution in point of time, did not intend that, notwithstanding that incapacity, the infant or feme covert should make such leases; and so might, implicitly, intend what he might have expressed, that they should be good leases whether made under that disability or not.

Without a doubt a power may be in a feoffment to the use of A. that A. may make leases whether within age or of full age, or covert, or sole.

(*f*)But I am of opinion that if that infant, to whom such a general power of making leases is given, be a feme sole, and she take a husband, and then make a lease, that lease now during her coverture is avoidable; for general words shall not solve that incapacity which she fell under after the power raised. And if I make a conveyance to the use of myself for life, remainder to my first son to be begotten, with such a power of making leases to myself, and after to my son when he comes to be in possession; if I die, my son at the age of twenty years, yet I hold that he cannot execute this power of leasing till he come to twenty-one. And the reason is the same for the construction of the words of this power, as it is for the like construction of acts of parliament; as the statute of wills "that all persons at their wills and pleasures may devise;" and of confirmation "that all grants to the king shall be good."—

If an infant feme sole to whom a general power, not collateral, of leasing is given, and she take husband, and then make a lease, it is avoidable.

Construction of general words in private powers is as in acts of parliament.

(*d*) Original reference. The same case is in Latch. 163. 268.

(*e*) Reference by Mr. Hargrave.

(*f*) This opinion is contrary to the conclusions laid down in the modern treatises. See Sugden on Powers, 156, 3d edit.; Roper's Law of Husband and Wife, Vol. II. p. 100. Powell on Powers, 33. But see note (*b*) above, p. 108.

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General words shall not extend to devises, or grants by infants, or femes covert; for by the presumption of law they are not fit to dispose of estates, or to have power to dispose them to their own prejudice; and the words are not so expressed but that they may admit that interpretation. And therefore in those acts that concern the disposition of an estate or interest the reason of the law turns, in case of infancy or coverture, upon the point of prejudice, or not prejudice, unto their interest.

11 Co. 77. Magdalen College case. General words to be construed according to the subject matter. In those acts which concern the disposition of an estate or interest, the reason of the law turns, in case of infancy or coverture, upon the point of prejudice, or not prejudice unto this interest.

An infant, though he cannot grant the next avoidance, yet he may present to the bishop; for that presentation ought to be without money. An infant cannot surrender a lease: yet if he take a new lease for a greater interest, it is good till avoided by him; if for the same term and no more, it is void, because it is without increase of term, or decrease of rent; and his acts are merely void where there is not apparent benefit, or semble of a benefit; for with cause Stone and Newman's case was adjudged that an infant may submit to an arbitrament; it is but voidable.

Stone *v.* Newman, Cro. C. 427. 460. but S. P. doth not appear (*g*).

So if disseisin be to the use of a feme, she takes nothing till agreement: but if an estate be made to her, or to her use, it is in her without the agreement of the husband, till he disagree.

Under a disseisin to the use of a feme she takes nothing till agreement: but if an estate be to her or to her use, 'tis in her till the husband disagree.

So in case of a condition:—if a man make a feoffment, proviso if he or his heirs pay ten pound, or tender a ring, his heir, though an infant or feme covert, may pay the money, or tender the ring.

It may be objected that these are not personal acts, as here, to subscribe with his own hand, &c. but may be done by another. Suppose then the condition were, if he or his heirs in person tender ten pound, or a ring, then to be void; this is an inseparable personal act; yet I doubt not but the heir within age, or feme covert, may in person tender the money or the ring, and so avoid the estate; for though it divest the estate out of another, yet there cannot in presumption of law be any prejudice to the infant or feme covert. There is a face or sem-

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(*g*) In March, p. 144. Bramston, C. J. is stated to have said, "that whereas by Stone *v.* Knight, Latch. 207., it appeared that the award should be voidable at the election of the infant, he held that the submission ought to be either absolutely good or absolutely void, the aid of an award being to compose controversies." But Gill *v.* Russel, Freeman 62, 139, is cited as an authority, that "an infant may be a party to a submission." Caldwell on Arbitrations.

The name of Stone and Newman in the margin is in an early handwriting, but the reference to Croke's Report is Mr. Umfreville's; and in that Report the point is not mentioned.

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blance of a benefit; and, therefore, the law in such case answers and supplies what in the other cases of passing an interest from them is presumed to be wanting; *viz.* reason in the infant, and free will in the wife; for every person must be presumed to do, and consent to, that which is for their own good, if they had the free use of their reason and will; and the reason why in any cases of powers infancy or coverture hinders the execution of them is not in respect of the person whose estate is to be revoked, but of the prejudice to the person revoking; and where there is no such prejudice, the reason is the same where there is, as where there is not, any such disability.

The reason why in any cases of powers infancy or coverture hinders the execution of them, is in respect of the prejudice to the person revoking.

I have made my gates bigger than my city: but, upon the grounds that I have laid, I shall distinctly consider the two powers; first, the power of revocation; and after, that of declaration of new uses.

First, I do conceive that Mary being of age of discretion, though a feme covert and an infant, may execute this power of revocation of the old uses.

First, For that it is apparently and necessarily in the eye of the law for her advantage to revoke the former uses; for by such revocation the estate settles in herself as heir; and it is a prejudice to her not to be able to revoke. So the reason of the common law respecting the prejudices or advantages of infants or femes covert in matter of interest extends to our case.

Powers of revocation resemble conditions.

Secondly, As I said before, powers of revocation have the greatest resemblance to conditions. Suppose a feoffment had been made to Bryan Stapleton upon condition, that if Bryan Stapleton or the heirs of his body shall put his and their hand and seal to, and deliver a writing purporting a revocation thereof, then the feoffment shall be void, I think it had been a good condition. This hath been heretofore questioned by some: but the difference is—a feoffment upon condition, if he shall revoke it, then to be void, is a void condition; but if the condition be circumstantiated,—as if a deed purporting a revocation, "if he subscribe it with his own hand," or "seal it with his seal," or "deliver it in the presence of three witnesses," or the like, —it is conceived to be a good condition; or if I make a conveyance at the common law, "provided if I tender a ring to be void," this is a good condition. What reason is there if I may limit it to be void upon tender of a ring I may not limit it to be void upon delivery of a deed? The delivery of a ring may have a proper or natural effect by transferring the property of it; and an improper or legal effect, the making void an estate upon the condition of delivery of it: and so may a deed a proper effect, for it to be a deed by delivery; and an improper effect, as if it be delivered in name of livery and seisin, it gives a pos-

Conditions.

C. C. 237.

Sharp's case, 6 Co. 26. Thorowgood's case, 9 Co. 136.

session and seisin. And it may have a like effect, first, to be a good deed; and, secondly, to signify the performance of a condition. And I think such a condition upon a feoffment or other common law conveyance, "that if he or the heirs of his body signed, and sealed, and delivered," such a writing, then the feoffment should be void," might be performed by the heirs of his body, notwithstanding the infancy or coverture of the heir of the body; for though the signing, sealing, and delivery were acts individual and inseparable from the person, yet they were but external, corporeal, and mechanic acts. There was nothing required but the thing done; nothing in the performance of the condition that of itself required any other concurrence of judgment, but such as was requisite to the natural efficiency of the act; as in the case if the conditions were "if he in person tendered a ring," though the act were personal, yet nothing more of skill or understanding was required to it than what was necessary to the effecting that act, that is, the tender of the ring.

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And the same reason holds in this case of the power, if it had been penned as Englefield's case; *if*, because the proof of his nephew was not yet seen, and that therefore it should seem to the uncle or the heirs of his body that the nephew was prodigal, that then it should be lawful to revoke; there was an act of judgment required, and an infant could not revoke, as I think, in that case. In Englefield's case these words were inserted: but it was only in a flourishing preamble. Because his nephew being an infant might prove prodigal or given to vice, it therefore provides if he tender a ring, the use shall be void; and so the power reacheth only to the act, the tender of a ring, not the intent of the tendering it. But if they had been inserted after the proviso, in Hardwyn and Warner's case, it was held by some Judges, the condition had not been given to the ring.

Latch. 57.

Tr. 2 Car. C. B. (*i*)

In the Duke of Norfolk's case the power runs "if *he shall be minded* to alter and revoke the uses, and shall signify his mind by writing," &c. But here the words have neither preamble nor introduction, but "provided that it shall be lawful for him or the heirs of his body by writing, &c. to revoke," which varies little from the expressions of a condition, as, "provided it shall be lawful by tender of a ring in person to revoke," and "provided if he tender a ring in person," it shall be void.

So that nothing in the deed itself appearing why we should make any farther construction of this power of revocation

(*i*) Palmer 249.

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otherwise than as we would of a condition in like cases, as the infant or feme covert is not disabled to perform the one, so neither to perform the other.

My last and third reason why she may revoke is from the deed itself, and the intent of Bryan Stapleton appearing in it. The words are, "that he or any of the heirs of his body may revoke all or any the uses:" and his general intent upon it was to give it to his wife and her heirs, if he had no children; but if he had, that the heir of his body might take it away from her. But if an infant or feme covert, heir of the body, cannot revoke, then the words and intent are not performed "that any heir of his body may revoke; probably no heir of the body may revoke; for the heir of the body may for several successions be a daughter, and those daughters be married (as more commonly than otherwise women are married) before twenty-one: then notwithstanding this power a stranger (as in our case) shall hold the land; and so she that was an infant shall prejudice herself irrecoverably by an act by her during her infancy, or her marriage, and that a lawful and commendable act: and in some cases, as in case of wardship, if she were in ward, a kind of compulsatory act.

The like may be the mischief, if the heir of the body were a son; if he cannot revoke during his minority, perhaps he can never revoke, for he may die during his minority, and leave a son or daughter behind.

This is not to make such favourable constructions of powers of revocation as ought to be made, where a man reserves a power to himself from whom the estate moved, or to his heir to whom it should have come.

Besides this power is not reserved to any particular person by name, pitched upon for any particular trust or confidence: but to the heirs of his body (who are not known to him what they shall be) or to any of them, but demonstrates that his particular care was for the heirs of his body. That though he loved his wife well, yet he preferred them in affection as to the having the estate before her; and so ought to be liberally construed.

As to the other power of declaring new uses, whether Mary, the infant or feme covert, can declare new uses by virtue of this power; I conceive it is not absolutely necessary for me to deliver any opinion in it; for if she may revoke the new uses, it is sufficient the law will raise up the old use, and vest the estate in her. And it is clear though these powers of revoking and declaring be both in one proviso, yet he who hath both the powers may use the one, and not the other. The words are, "It shall be lawful:" It gives a liberty: but it is not compulsa-

tory and entire as a condition. He may execute the power of revocation by one deed, and the power of declaring new uses by another deed; and that proves he may execute one at one time, and the other at another time; and it follows upon it in reason he may use the power of revocation, and not execute the other.

But yet for my own opinion, upon the grounds which I have laid, I do hold that Mary, though she may revoke the uses to her mother, yet cannot limit any use to her husband, or any other stranger during her minority; for that is apparent to her prejudice, and the wronging of her interest, and so against the reason and construction of law in like cases. And upon the same reason I think if she declared the use to herself and the heirs of her body, it is a void declaration; for it is to her prejudice to have a fettered estate, and not perpetual, when she might have had it free and unlimited. And if she declare the use to herself and her heirs, as in our case, it is no more than the law would have implied upon the bare power of revocation; and, therefore, she shall be said to be in by virtue of the old use, and not a new declaration.

There hath been an objection made against executing either of these powers during the minority or coverture of Mary; *viz.* that Bryan Stapleton reserving the power to revoke by his last will and testament, or other writing, he did not intend any should revoke but those who could make a last will.

But this is to turn "or" into "and" without any cause for it. I might turn the argument upon the objector. An infant of seventeen may make a testament; so may a feme covert executrix; and he intended those who may make a testament may revoke; and, therefore, an infant of seventeen might revoke. Both the arguments are of like force—neither of them concluding.

And another objection was made, that this revocation, though it be said to be by the consent of the husband, yet he is no party to it; and she can do nothing without her husband's consent; and the alleging in the writing that her husband consents is not sufficient.

I answer, if the husband's consent were requisite, the alleging it in her writing were not sufficient: but that point was ruled in Daniel and Ubby's case, that the conveyance by the wife, alone without her husband, was good; and if the husband's consent be also to it, as it makes not the case the better, so it makes it nothing the worse.

Upon what has been said it appears, that this revocation by Mary ariseth out of her father's conveyance. She is but an instrument in it: the act indeed is personal and inseparable to

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be done by herself: but her personal defects by coverture or infancy cannot suspend the doing of it.

So that, upon the whole, I hold this power of revocation is well executed; and so that Mary and her husband, lessors of the plaintiff, had a good title when the ejectment lease was made; and so the plaintiff ought to have judgment.

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Pasch. 14 Car. 2. Rot. 408.

(Ecclesiastical leases under the restraining statutes.)

Harg. MS. No. 56. fol. 130. No. 58. fol. 17.

BRIDGMAN, C. J.

Ejectione firmæ by George Lyn against Maurice Wyn, of a house in the parish of St. Martin in the Fields, upon the demise of Thomas Brumstead upon a special verdict.

The case is this:—23 Decem. 4th and 5th P. and M. the Abbot and Convent of Westminster leased nine houses, whereof this in question is one, to Wirley for ninety-nine years at 53*s.* 4*d.* rent *per annum*. The reversion came after to the Dean and Chapter of Westminster: the lease came afterwards to Nightingale, who grants this house in question to Mary Ratcliffe for sixty-one years, five months, and twenty days, at 20*s.* rent, (having in himself a *residuum* or reversion for ten days) which estate of Mary Ratcliffe came to Sir Richard Wyn; who being possessed, John Bishop of Lincoln then Dean, and the Chapter by indenture, 30 Jannarij 1640, wherein it is mentioned that in consideration of a surrender of a former lease and estate, whereof there were divers years yet in being; which surrender they did by the said indenture accept, and for 50*s.* fine, &c. they did thereby demise the said messuage to the said Sir Richard Wyn,

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(*a*) This case is reported in Nos. 56 and 58 of the Manuscript, which vary slightly in quantity of matter. In the report in Carter, p. 9, under the name of the Dean and Chapter of Westminster's case, the Court is represented to have been divided; and the roll in the Common Pleas is not filled up with any entry of the ultimate judgment. No memorial of the case can be discovered at the office of the Dean and Chapter of Westminster.

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habendum from the making of the said indenture for forty years, at 53*s.* 4*d.* rent; with covenants for repairs by the lessee as is provided by the 14th Eliz. c. 11. s. 19.

And it is found that the house was situate in the Strand within the city and borough of Westminster; and that a garden of half an acre doth belong to it. That it is not, nor was, a mansion house used for the habitation of the Dean and Chapter.

That John Bishop of Lincoln died. That John Earle, the present Dean and Chapter, did receive 53*s.* 4*d.* the 26th October 1660, for the rent for a year ended at Michaelmas then last past; and the acts of 13 Eliz. c. 10., 14 Eliz. c. 11. and 18 Eliz. c. 11. are found; and that in February 1661, the said Dean and Chapter did enter into the said messuage, and were seized *prout lex* &c.; and demised to the lessor of the plaintiff at 53*s.* 4*d.* rent for sixteen years, &c.

Two general questions have been made in this case.

The first, Whether this lease in 1640 made to Sir Richard Wyn of a house in a city (there being then unexpired of the old lease seventeen years, and a reversion for ten days in another, so that it cannot take effect as a present lease) shall be good as a concurrent lease by 14 Eliz., and not avoided by 18 Eliz.

And I hold this lease is not warranted by 14 Eliz., and therefore voidable by 18 Eliz. (*b*)

The second general question is, Whether, when such an unwarrantable lease is made by a Predecessor Dean and Chapter, whether, by the acceptance of the rent reserved upon that lease by the Successor Dean and Chapter, that lease is now made unavoidable by the same Dean and Chapter?

And I hold the same Dean and Chapter have affirmed the lease: so that during that Dean's time it cannot be avoided.

And there is a third question, Whether, as this special verdict hath found the acceptance of the rent, *viz.* that the said John Earle, then and yet the Dean, and the Chapter, 26 *Octobris* 1660, did receive 53*s.* 4*d.* for the rent of the house

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(*b*) On this point the Judges agreed, see Carter 9.—Ventris 246, notices the case in these words:—"In 1 Cro. 546., Hunt and Singleton's case, a lease of an house for forty years (there being ten unexpired of a former lease) by the Dean and Chapter of St. Paul's was held not warranted by the 14 Eliz. The like was resolved in C. B. 14 Car. 2. in the case of Wyn *v.* Wild, of a lease of the Dean and Chapter of Westminster; and there the Court denied the opinion in Tomson *v.* Trafford's case, Poph. 9."

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in question for the year ended at Michaelmas before, upon the said indenture made to Sir Richard; without finding that they accepted it by deed, it shall be taken for such an acceptance as is legal, and to disenable the said Dean, Earle, and Chapter to make a new lease to Brumsted, the plaintiff's lessor.

For the first point; Whether this lease made to Sir Richard Wyn be warranted by the 14 Eliz. And if not warranted by 14 Eliz. whether avoidable by 18 Eliz. the clear discussion thereof requires;

First, the consideration of the statutes concerning leases by Deans and Chapters.

And, secondly, Of the nature of this lease, (which is in effect but a concurrent lease) whether, and how far, it should now be by estoppel at the common law; and whether, if it be a lease *in præsenti* by estoppel at the common law; yet whether it be, or be not, restrained by letter or intent of the statute of 14 Eliz., as being in truth to take effect as a lease in reversion, and not in possession.

By the common law a Dean and Chapter might have made what estates they would of their possessions; as any person, owner of the fee simple estate, might do.

For the first, the consideration of the statutes concerning leases by Deans and Chapters. By the common law a Dean and Chapter, being a corporation aggregate, might have made what estates they would of their possessions; as any person owner of a fee simple estate might do. But a Bishop, or a Dean of the possessions of his deanery, or other ecclesiastical person, being a single corporation, were not entrusted by the law singly, without the consent of the Chapter, Patron, or Ordinary, as the case required, to aliene their possessions. And therefore the cases upon the statute 1 Eliz. of concurrent leases by Bishops are not at all to be resembled to our case, further than the words of that act and of these acts restraining Dean and Chapters are, or shall be made to appear to be, the same; which, under pardon, are very differing expressions: and it hath not, nor can, as I conceive, be made to appear the same.

The statute 32 H. 8. c. 28. gives power to such persons only to lease who had of themselves no power to make leases before that act.
Co. Litt. 45 a.

Neither, in the second place, doth any enabling clause upon the statute of 32 H. 8. c. 28. by tenant in tail, baron and feme, Bishop, Dean of the possessions of his deanery, Prebends, &c. touch this present case further than the words of that act are the same with these acts. For 32 H. 8. gave power to such persons to lease who had of themselves no power to make leases before that act. But a Dean and Chapter, Mayor and Commonalty, Master and Fellow of Colleges, and other corporations aggregate, had then a power by the common law, to make such leases, as that act allows to those persons thereby enabled; and therefore are not within the compass of that act.

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'The acts concerning Deans and Chapters are, the stat. 18 Eliz. c. 10. and these two of 14 Eliz. c. 11. and 18 Eliz. c. 11., all which, as I shall shew, are material in our debate.

13 Eliz. c. 10.

13 Eliz. enacts, "for that long and unreasonable leases be the first causes of dilapidations and the decay of all spiritual livings, and hospitality, and the impoverishing of successors, incumbents in the same, that all leases or estates by any Dean and Chapter other than for the term of twenty-one years, or three lives, from the time as any such lease shall be made or granted (whereupon the accustomed yearly rent, or more, shall be reserved, and payable yearly during the said term,) shall be utterly void," &c.

I must agree, that this lease to Sir Richard Wyn in question would not be restrained by the letter of this act, if it had been but for twenty-one years from the time of the making (as it is for forty years), though there had been a lease *in esse*: for it exceeds not the years, *viz.* twenty-one years—nor the limitation, *viz.* from the time of making. There would be no more leases out than such as should be determined; and therefore upon that statute twenty concurrent leases might have been made, one on the neck of another. As a lease to A. for twenty-one years, then to B. the next year for twenty-one years, to begin from the making, &c. and so to C.: and all these would have stood together. And so it is said by my Lord Coke to have been resolved, that such concurrent leases were good, as well in the case of Dean and Chapters upon 13 Eliz. as Bishops upon 1 Eliz. And so in Crane and Taylor's case, "that a lease in reversion was not restrained by 13 Eliz. as appears by the recital of the statute 18 Eliz. which provides for that mischief, as not provided for before."

By the 13 Eliz. c. 10. a Dean and Chapter may lease to A. for twenty-one years; then to B. *the next year*, for twenty-one years, to begin from the making, &c.; and so to C.: and all the leases will stand together.
1 Inst. 45 a. Crane *v.* Taylor, Hobart 269.

But this use I make of that recital of the statute 18 Eliz. It saith expressly, that such "leases for twenty-one years long before the expiration of former years were contrary to the intent and true meaning of the said statute of 13 Eliz.:" though, as to such leases formerly made, it leaves then to be of the same effect in law as they were before that act.

And upon this statute of 13 Eliz. our lease in question would be void, as being for forty years from the making, and not for twenty-one years only.

The statute of 14 Eliz. c. 11. reciting, "That in the act 13 Eliz. there is one branch to avoid certain leases to be made by deans and chapters, &c. It enacts that the said branch shall not extend to any grant or lease of any houses or grounds thereto appertaining, which houses are in city, borough, town corporate, or market town, but that the same may be granted or demised, as by the laws of this realm, and the several sta-

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tutes of their churches, &c. they lawfully might have been before the making of the said statute, or lawfully might be, if the said statute were not made. So alway that such house be not the capital or dwelling-house used for the habitations of the persons abovesaid; nor have grounds to the same belonging above the quantity of 10 acres, any thing in the said act to the contrary notwithstanding,"

Then it enacts, " That monies recovered for dilapidations shall be employed in repair of the same houses, upon pain of forfeiture of double thereof."

" Provided always, and be it enacted, That no lease shall be permitted to be made by force of this act, in reversion, not without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparation, nor for longer term than forty years at the most. Nor any houses shall be permitted to be aliened, unless that in recompence thereof there shall be good assurance made in fee simple absolutely to such body politic and their successors, of lands of as good value, and of as great yearly value at the least, as so shall be aliened, any statute to the contrary nothwitstanding."

First, upon the words of this statute it must be agreed that if this last proviso do not extend to bring our lease back again within the compass of 13 Eliz. that then this lease being of a house within a city, and not the mansion-house of the Dean and Chapter, nor containing above ten acres, it is wholly out of the compass of 13 Eliz. and left by the act of 14 Eliz. to have the same force as it would have at common law.

And, secondly, in such case, if it be wholly exempted out of 13 Eliz. it is also wholly exempted out of 18 Eliz. which is the last act to be considered relating to estates to be made by Deans and Chapters. That act 18 Eliz. reciting, as I said before, the branch of 13 Eliz. and that leases by the said ecclesiastical persons, for twenty-one years, or three lives, long before the expiration of the former years, was contrary to the true meaning and intent of the said act." And it therefore enacts, " That all leases hereafter to be made by any of the said ecclesiastical persons, of any of their said lands, tenements, or hereditaments, whereof any former lease for years is in being, not to be expired, surrendered, or ended, within three years next after the making of any such new lease, shall be void, frustrate, and of no effect, any law, usage, or custom, to the contrary notwithstanding."

In which act, though the words are general, " that all leases by the said ecclesiastical persons of any of their said lands, whereof any former lease is in being, not to be ended within three years shall be void," and that the persons and the lands here were

once within the provision of 13 Eliz.; yet I hold, that the qualifications of 14 Eliz. being observed, this act of 18 ought not to be construed to extend to them; but only to such leases and estates as at the time of the making of 18 Eliz. were within the compass of 13 Eliz. For there are lands sufficient to satisfy the act of 18 still remaining within the compass of 13. And the law will not allow the exposition to revoke or alter, by construction of general words, any particular statute, where the words may have their proper operation without it. That is frequent in construction of grants, much more of acts of Parliaments; and the reference to 13 Eliz. makes it more reasonable to extend 18 Eliz. only to such possessions of the Deans and Chapters as were within 13 Eliz. when 18 Eliz. was made.

The law will not allow general words to revoke or alter any particular statute where such words may have their proper operation without such revocation or alteration.

Like the Lord Darcy's (*c*) case; the Dean and Chapter of Paul's were exempt from purveyance by charter of E. 4. By act of parliament 27 H. 8. this liberty of exemption from purveyance was extinct. Then King Edward VI., who had some manors from the church of Paul's, grants them to the Lord Darcy, with *tot, tanta, talia, et consimilia libertates*, &c. *quot, quanta, qualia*, the Dean and Chapter *unquam ante hac habuerunt*, &c. *ratione alicujus chartæ*, &c. *non obstante aliquo statuto*, &c. It was adjudged, this charter did not revive this liberty of exemption from purveyance, which was extinct before: but it would have revived a liberty that was not annulled, but determined by the death of the tenant for life thereof. So here these lands, if wholly taken out of 13 Eliz. shall not be within compass of 18 Eliz. which reached to 13 only, and not to 14 Eliz. And so it is resolved in Crane and Taylor's case, before cited, that 18 Eliz. touched not 14 Eliz. And therefore the covenants to lease the Bell Inn in Newgate (which was within the 14 Eliz.) did bind the Dean and Chapter, as being out of 18 Eliz. which made all covenants for renewing of leases contrary to that act to be void.

But in the next place I hold that though houses in London, Westminster, &c. with such qualifications as are mentioned in 14 Eliz. are out of 13, and consequently out of 18 Eliz.; yet they are out of 13 Eliz. but *sub modo*, and so as they observe those qualifications; *viz.* that they be not mansion houses of the corporation, nor have above ten acres, nor be made in reversion, nor without reserving the accustomed yearly rent, nor without charging the lessee with reparations, nor for longer term than forty years, nor that any such houses be aliened

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(*c*) Stated more fully in 17 Viner 550 a. Moor 417. Cro. Eliz. 512. Co. Entr. Patreg. (A. c.) pl. 1. (Z. d.) pl. 1.

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without recompence in fee-simple, &c. And that such estates as shall be made otherwise than is agreeable to these provisions are void; and not only so, but restrained by 13 Eliz. and consequently by 18 Eliz. also. So that the statute of 14 Eliz. is to be expounded thus:—That leases of houses in cities shall be out of 13 Eliz. if they be not mansion houses for them, nor have above ten acres, nor be made in reversion, nor without reserving the accustomed rent, &c. But, if they be made contrary to these exceptions, then 14 Eliz. reacheth not to them, but they remain as they were by 13 Eliz.; and so, consequently also tied up to the qualifications of 13 and 18 Eliz. As if the Dean and Chapter had made a lease for 100 years, or without reserving any rent, I think, though it be of houses in corporations, the lease was out of 14 Eliz. and so remains within the restraint of 13 Eliz. And if 13 Eliz. restrained it, then it is also within 18 Eliz.

That this construction, and no other, can be made of 14 Eliz. will be apparent by considering both the words and meaning of it.

The words are "That that branch of 13 Eliz. shall not extend to houses in cities, but that they shall be granted, demised, &c. as they might be if the said statute of 13 Eliz. were not; so alway that such house be not a dwelling-house of the Dean and Chapter, nor have ground above ten acres." The words "*so alway*" restrained the general words of exemption in those two cases. Then follows (after the interposition of a clause concerning dilapidations) the other clause. "Provided always, and be it enacted, That no lease shall be permitted to be made, by force of this act, in reversion, nor without reserving the accustomed yearly rent, &c.; nor shall any houses be permitted to be aliened without recompence in fee simple, any statute to the contrary notwithstanding."

This proviso hath the same force as the "*so alway:*" it takes out of and diminishes the force of the general words to which it hath reference. If a house or lands be leased to one for life or years, *ita quod* he inhabit in the house, and proviso he pay such rent. The proviso is a condition, and determines the estate as well as the words of limitation: and we know the usual practice in passing of bills to add several provisoes, every of which takes off from the enacting part of it, let them be placed in whatsoever part of the bill.

The usual practice in passing bills is to add several provisoes, every of which takes off from the enacting part, in whatsoever part of the bill they may be placed.

Then for the intent of the act of 14 Eliz.—It is apparent it meant to restrain any leases in reversion, or without reserving the old rent, &c. or alienations in fee without recompence.

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But if the act of 14 Eliz. should be construed to except houses wholly out of 13 Eliz., and not *sub modo*, and under such qualifications, then the proviso were useless: for being left wholly out of 13 Eliz. though 14 Eliz. did forbid them, or indeed the phrase is more gentle—did not "permit" them to make leases in reveraion, or to reserve less than the old rent, or to alien in fee; yet, being left as they were before 13 Eliz., they might grant or lease in fee, in possession, or reversion, with or without rent, as they pleased: and this mischief would continue to this day. If it be objected, the statute 14 Eliz. prohibits such leases (admit, I should grant it, though there is no direct word of prohibition, but "that leases shall not be permitted to be made in reversion," &c.) yet the remedy upon that statute will be at most but an action upon that statute against the party who broke it. But when he is dead his successor cannot *avoid*, by virtue of that prohibition only, a lease, or alienation, made by the predecessor: that clause or proviso, nor any words of the 14 Eliz. do say, that such lease or alienation shall be *void*; for then, indeed, there might be some colour to avoid the lease by the 14 Eliz. but it only provides and enacts, "that no such lease shall be made by force of that act," *viz.* 14 Eliz., "in reversion, or without reserving the old rent, or above forty," &c.: which is of no effect, if the proviso have not reference to keep such cases within 13 Eliz. For though they have no power by force of 14 Eliz. to make such estates—and further than that the words of the proviso in 14 Eliz. do not extend—yet they will have it by common law, if they be wholly left free from 13 Eliz.

But that leases, not being warranted by 14 Eliz., fall within the restrictions of 13 Eliz., is farther affirmed by the authority of my Lord Coke in Lincoln College case, where, citing Hunt and Singleton's case of a lease of a house in Foster-lane, being the inheritance of the Dean and Chapter of Paul's (and so expressly within 14 Eliz.) he saith, "that if a Dean and Chapter make a lease not warranted by 13 or 14 Eliz. it is provided by the said acts that such lease shall be utterly void." That he admits for granted, that such lease is void, and then makes the question, and resolves it there, that nevertheless "it is not void till after the death of the dean who made it." Now there are no words in 14 Eliz. to make the lease void, but only the construction and inference upon the statutes, that, not being warranted by 14 Eliz., it remains restrained by 13 Eliz., which makes leases against that act void.

3 Rep. 60. a.

Which resolution he also mentions in several others of his reports.

So that ground being laid, that if this lease be not warranted by 14 Eliz., that then it is still restrained by 13 Eliz., and consequently also by 18 Eliz., it will follow that this lease is void-

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able by 13 Eliz., because made for a longer time than twenty-one years: and also by 18 Eliz., because the lease in being doth not end, nor is surrendered, within three years after the making of this to Sir Richard Wyn.

So that the next thing to be considered is,—the nature of this lease made to Sir Richard Wyn: whether, and how it works by estoppel, and how by interest:—and that being cleared, we may thence take our measures whether this be a lease in reversion prohibited, or a lease in possession warranted by the letter and intent of the stat. 14 Eliz.

When Sir Richard Wyn had seventeen years or thereabouts in being at twenty shillings' rent, the reversion being for ten days in Nightingale, his acceptance of a new lease for forty years by indenture from the making of the indenture could not work as a surrender, though it be so recited, because there was a reversion in Nightingale which did interpose. So that in truth and in fact the seventeen years remained in him still, and he was a tenant to Nightingale, and to pay his rent to him; and when the seventeen years were expired, Nightingale had the interest for ten days, and by virtue thereof might enter. So that in truth Sir Richard Wyn after the lease for forty years made, had seventeen years remaining of his old lease: then Nightingale, who was still tenant to the church, had ten days as a reversion in respect of Sir Richard Wyn, who was a tenant to him, and Nightingale was tenant to the dean and chapter: and Sir Richard Wyn had the twenty-three years distinct as an interest future to begin after the seventeen years and ten days.

Thus it was to all persons in truth and in fact; and, therefore, if Sir Richard Wyn had granted his seventeen years, or his twenty-three years to begin after Nightingale's term ended, as he might, the seventeen years would have well passed to a stranger as the residue of the old term, or the twenty-three years as a future interest.

But as between Sir Richard Wyn, or his assigns and the dean and chapter, in respect the indenture of lease, to which both the dean and chapter and Sir Richard Wyn are parties, is express that it is demised to Sir Richard Wyn for forty years from the making, both parties by the common law are estopped to say otherwise—both the lessors and lessees. But yet in truth the lease for forty years is but a lease for twenty-three years, to begin after the term of Nightingale ended.

Estoppel.
Co. Litt. 352.

"It is called an estoppel," saith my Lord Coke, "because a man's own act or acceptance estoppeth or closeth up his mouth to allege or plead the truth." So that the truth is, this lease is but for twenty-three years, to begin after the former lease expired: though Sir Richard Wyn or the dean and chapter at

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the common law, could not say so. The reason is given in Smith and Stapleton's case, Com. 432. where this learning is at large set down. When the lessor hath made a lease, he hath nothing but in reversion during that time, and hath not authority to contract for the possession; and, therefore, during the continuance of the grand lease here, for ninety-nine years, his contract for any part of the ninety-nine years was a void contract in law, and in fact but only good by estoppel between the parties, and those that come under the estoppel. So that, to say this second lease for forty years is a lease for forty years by estoppel, is to say it is not a lease for forty years in truth. It is but a fiction, as was well said, to hinder him from giving himself the lie.

Cro. Eliz. p. 436. An assignee of a lease by estoppel shall not take advantage of any covenant. Lessee by estoppel cannot assign any thing over.

And, therefore, in Noke's case (to another purpose reported by my Lord Coke,) it was resolved that an assignee of a lease by estoppel shall not take advantage of any covenant (for in truth there was no lease, and so, in truth, he no assignee of that which was not,) nor can lessee by estoppel assign anything over.

Then looking at our case without the estoppel, it is no more but this:—A lease is made by a Dean and Chapter of a house in Westminster for twenty-three years, to begin seventeen years hence; whether such lease be not a lease in reversion not permitted by the proviso in the act of 14 Eliz.?

And I think, with some clearness, it is a lease in reversion, and not permitted by the proviso in the act of 14 Eliz.

First, I hold, whatever is not a lease in possession within the act is a lease in reversion, whether it be in remainder or in future interest. The words are, not that no lease shall be permitted to be made *of a* reversion, but "in reversion."

Reversion, what.

A reversion in a proper legal sense implies such an estate to which there is an attendancy of a particular estate, upon which it depends, and is expectant, as the pleading is; and yet even the word reversion, as hath been cited, *secundum subjectam materiam* is often taken for *terra reverlens.* (*b*) But an estate "in reversion" hath been in all constructions of deeds taken for an estate *in futuro*, and not in possession: *a fortiori*, in an act of parliament.

Throckmorton and Tracye's case, fol. 145. b. An estate "in reversion hath been in all constructions of deeds taken for an estate *in futuro*, and not in possession; *a fortiori* in an act of parliament.

My brother Browne, as I apprehend his argument, would have neither a concurrent lease, nor a future lease or interest, to be within the words of 14 Eliz. a lease in reversion: but

Berry *v.* White (*c*).

(*b*) Stamford's Judgment, p. 160. Plowden and Dyer's argument 158. and Co. Litt. 142. b.

(*c*) This reference to the case of Berry *v.* White, published in the present volume, p. 82. is in the hand-writing of the original manuscript.

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that the statute means only such a reversion where the grantee or lessee receives the rent; and so confounds a lease *of a* reversion and a lease *in* reversion, which is not only contrary to common parlance, but to the legal acceptation of the words "in reversion," cited plentifully by my brothers out of Throckmorton and Tracye's case, Com. 151. 153. 10 Co. 4. (*d*) 8 Co. 55. 57. F. N. B. 201 E. 144 E. 211 D. n. 1 Cro. 198. Reg. 164. 238., by all which, and infinite other cases, it appears that not only in vulgar discourse, but even in a legal sense, the word *reversion* is taken, not alone for a reversion where there is a rent or services, expectant or attendant, but also (as Sir Anthony Browne defines it, Com. 157.) for a remnant of an estate where part is out already. A reversion of lands, saith he, is that part of the lands which is left after a particular estate, and may be called the residue or remnant of the land. But the words here being a prohibition to make a lease in reversion, in my opinion there is nothing more clear, than that it prohibits, not only leases of reversions, but all leases whatsoever where there is a particular estate out.

8 Co. 70.

In Whitlock's case there is a power to make leases "*tam in possessione quam in reversione:*" by virtue thereof a lease made for years, to begin after the death of Joan Bulhead, who was tenant for life, was clearly good as a lease in reversion.

4 Co. 53. a.

In Rawlyns' case the words are, "Cartwright demiseth a stable to Warlow for six years, and after demiseth to Rawlyns for twenty years, *issuit que ceo est bon leas in reversion pour* 14 *ans.*, so that this is a good lease in reversion for fourteen years. It makes no suspension of a rent or condition; for it is not any grant *of a* reversion, but a future interest *in* reversion: no term, but an interest of a term, as the pleading is. And the lessor shall have the rent reserved upon the first lease: but if there were attornment, then the reversion passed."

And so in the case 19 Eliz. 357, (*e*) cited by my brothers to another purpose, a lease was made for twenty-one years by baron and feme. The baron, after twenty-one years expired, according to a power by a special act of parliament, 35 H. 8. leaseth for twenty-one years after the end of the first term for twenty-one years. It is expressly said that this is a lease in reversion; and the question is there put "whether he could make it, there being no restraint of a lease in reversion in the act:" the words being general, "that all leases by him by indenture for twenty-one years, reserving the accustomed rent,

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(*d*) 124.

(*e*) Dyer 357, pl. (43). See Appendix F.

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should be good." And Co. Com. 54. *literatim*,—"If a man make a lease for life or years, and after grants the reversion for years, no waste lies:—otherwise, if he had made a lease in reversion, which had been but a future interest, there an action of waste lieth during the term." So that a lease by way of future interest in all these cases is called expressly a lease in reversion—*a fortiori* in an act of parliament, which is to be construed according to the common parlance and general intendment of words. And so a lease for twenty-three years, to begin seventeen years hence, is a lease in reversion, and contrary to the words of the proviso in 14 Eliz.

An act of parliament is to be construed according to the general intendment of words.

My brother Archer hath made a very ingenious distinction between a future interest and a lease in reversion. That a lease in reversion is where there is a particular estate out, precedent; as a lease made to A. for twenty years, and after the same is granted, either by the same, or another deed to B. for thirty years: this is a lease in reversion to B. But if a man, being seised in fee, grants for thirty years, to commence at a day to come, in the mean time he is seised; this he calls a future interest. But he truly saith, and so appears by the cases cited, they are often taken for the same thing. And the truth is, they are but the same thing in law, for the pleading is the same. Where a lease is in being, and a second lease is made to begin after it, the pleading is *virtute cujus* he was *de tali interesse inde possessionatus*, or *de interesse prædicti termini* 30 *annorum possessionatus*. The truth is, there is no distinction at all in law, (though if there were it is all one to our case,) between a lease in reversion and a future interest. Both signify the same thing, unless there were an attornment: and the words *future interest* is not in pleading, nor the words *concurrent lease*, which (setting aside the estoppel) is a plain lease in reversion or future interest, but are words lately devised since the statute concerning leases by ecclesiastical persons for explanation's sake and to avoid circumlocutions.

N. E. 48, 187, 192, 592.

But, in the next place, it must be agreed that at the common law, as between Sir Richard Wyn and the Dean and Chapter, this is to be taken as a present lease in possession for forty years from the making of the indenture: and the Dean and Chapter and the successor dean were bound by the estoppel to say otherwise. And it is urged they are still bound by the estoppel notwithstanding the stat. 14 Eliz.; and arguments have been drawn to enforce it by the benefit which redounds to the Dean and Chapter by it. They shall have two rents: one by the old, the other from the new lease; and from other parallel cases of concurrent leases by bishops, and leases by tenant in tail, &c. and the scope and intent of this act of 14 Eliz.

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Estoppel.

But I conceive that this lease (as being in truth a lease in reversion for twenty-three years, to commence after Nightingale's term ended,) not being warranted by the proviso of 14 Eliz., shall not be good by estoppel against a successor: for as to the present Dean who made *not* (*f*) the lease with the chapter—whether the lease shall be good against the same Dean who made the lease with the Chapter, is not now the question.

There is no estoppel against an act of parliament.

1st, Because there is no estoppel against an act of parliament; and the lease itself being prohibited by the statute, a fiction of law shall not make it good. And, therefore, if a lease by indenture by a Dean and Chapter, be made of lands for more than twenty-one years, this is void by 13 Eliz.; or whilst another lease is in being above three years to come, this is void by 18 Eliz.; for the lease being made void by the statute, *ex consequenti* there is no estoppel.

2dly, The estoppel would conclude only privies, not strangers. But the makers of the act of parliament, and the former lessee, for whose benefit (*g*) it is that no concurrent lease should be made over his head (which, as I shall shew by and bye, was the principal intent of making this provision against leases in reversion) are strangers to the estoppel; and therefore shall not be prejudiced by it, or hindered to say the truth.

3dly, The lease not being made according to 14 Eliz., it remains within 13 Eliz. restrained by it, as I said before; being not exempt by 14 Eliz., unless it were warranted by the proviso in 14 Eliz.: but, not being so warranted, it is made void by 13 and 18 Eliz. which make void all such leases as to the successor, and consequently the estoppel also.

1st. For the intent of the act of 14 Eliz.—I conceive it is apparent it intended to prohibit such leases as these. Neither the statute of 1 Eliz. nor 13 Eliz. had any express words to restrain leases in reversion; nor were the words "in reversion" mentioned in them. And, therefore, as appears by the preamble of 18 Eliz., the Dean and Chapter made concurrent and reversionary leases, contrary to the intent of 13 Eliz. which was after by that act of 18 Eliz. expressly prohibited. And that mischief was the cause of this express clause in 14 Eliz. "That leases should not be permitted to be made in reversion." What other end can be imagined of this varying of the phrase and restraining leases in reversion by the 14 Eliz., but this, that leases should not be made over the old tenants' heads.

(*f*) The word "not" seems to have been omitted here.

(*g*) Lord Coke says that it was held, that these statutes were made for the benefit of the successors, 3 Rep. 60. See 3 Bos. and P. 328. and 2 Woodeson, 288. But query, if Lord Coke does not mean that 13 Eliz. and not 14 Eliz. was passed for the benefit of successors? and thus Sir Orlando Bridgman and Lord Coke will agree; see p. 137.

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2dly, This act of 14 Eliz. was concerning houses, which are subject to dilapidations; and the clause immediately precedent provides against dilapidations: if leases in reversion over the old tenants had not been provided against, it is apparent the old tenant would be discouraged from repairing for another; whereas the hopes of renewing would encourage him to keep it in repair.

3dly, I do believe, as hath been said, that they looked upon the houses as candle rents, and subject to casualties by fire; and they provided by another clause, that whatsoever should be recovered for dilapidations past should be employed upon the buildings; and care was taken for covenants to repair. But yet I think the intent of this act of 14 Eliz. was not principally for the benefit of the church, but for the benefit of the tenant. And, therefore, whereas the Dean and Chapter were by 13 Eliz. restrained to leases not exceeding twenty-one years, now they are enlarged to forty years: and the prohibiting to make leases in reversion, and under the old rent, was for the benefit of the lessee; that the Dean and Chapter might not every year bring a new tenant over his head. And there is no part of that clause in that act of 14 Eliz. concerning leases for the benefit of the church. The clause for alienation provides for an equal recompence presently after, not for a greater recompence; and if it were a greater recompence, being a mortmain, I think it void.

Concurrent leases.

And, for my part, I think the restraint of the power to make reversionary leases, which was permitted by 13 Eliz. was more to the prejudice than advantage of the successor, as it would be at this day to take it from Bishops enabled to make such leases by 1 Eliz.; for when there is power to renew every year, the successor bishop by this manner may enforce the tenant to renew and pay a fine, or make a concurrent lease to his own use; whereas if he could not make such a concurrent lease, the tenant would have his own terms, or not renew during the life of the bishop, who commonly is old when he comes to be bishop, and will not probably outlive a lease of twenty-one years lately renewed. And the same reason holds in case of a Dean; though the corporation be aggregate, the head of it, the Dean is commonly old before he come to be Dean; and, therefore, his being restrained not to make leases till within three years of expiration of the former lease is more for the benefit of the tenant than of the church.

Besides these concurrent leases being made, reserving the old rent, (as they must) they have one rent from the tenant in demesne, and another from him to whom the concurrent lease

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Moore 107.
Tr. 21 Eliz.

is made, for which they may either bring an action of debt; or, after it comes to be a lease in interest, distrain for all the arrears, as it is agreed in Collyer and Fox's case.

And I see not how the second lessee can avoid payment of the arrears of rent, though he have not the possession. It is true, expulsion and eviction by the first lessee, by virtue of his former lease, being a paramount title, is good to avoid the payment of his rent. But then consider whether, after his entry by virtue of his concurrent lease, the re-entry of the first lessee do not leave a reversion in him; for if it do amount to an attornment at law, then he hath the rent and reversion in him *in præsenti*, and so is void by 1 and 13 Eliz. against a successor (*h*). As if a lease be made for twenty-one years, rendering rent, and a second lease is made by deed-poll, or indenture for twenty-one years, to begin during the continuance of the first lease; this works as a future interest for so much as remains after the first lease ended: but if there be an attornment by the lessee, it is a present reversion, to which the rent of the first lessee shall belong.

4 Rep. Rawlins' case. Plowden 426. Smith *v.* Stapleton.

Litt. Sect. 566. 567. Co. Com. 319.

If the feoffor enter upon lessee for years, and give livery of seisin to the feoffee, though they are both trespassers, the re-entry of the lessee makes an attornment. Nay, if there be tenant for life, reversion for life, and the reversioner in fee make a feoffment, the re-entry of the tenant for life, who could not attorn in fact, revests a reversion in the feoffee, because he had a possession before. The same reason holds, where the first lessee re-enters upon the second lessee for years, who was in possession; he leaves a residue of the term in the second lessee. But of this I know no authority *pro* or *con*.

(*i*) [There may be some difference between an entry of lessee for years upon the feoffee, where of necessity he leaves a reversion; and re-entry of lessee for years upon a second lessee for years, who had indeed nothing *de præsenti* in right without attornment, but by estoppel: *ideo quære*. But, however, if the first lessee and second lessee of a bishop shall agree together, that, to avoid payment of a double rent, the second lessee shall enter, and then the first lessee shall re-enter and so there is an eviction that this entry and re-entry, being by consent, may amount to an attornment, because the entry was by his consent.] But still, I observe, the making of concurring leases is for the lessor's benefit, and the restraint of them is for his prejudice. And I observe that neither 18 Eliz.

(*h*) Being in effect without impeachment of waste.

(*i*) The passage between brackets is in one copy only of the MS.

c. 11. nor 14 Eliz. c. 11., which restrain concurrent or reversionary leases, have any preamble which might shew that they intended thereby the benefit of the church; as the act of 13 Eliz. hath, which makes me to think a principal, if not the only aim of those two statutes was, that there should be no new leases made over the old tenants' heads, till the old lease was near expiring. But he, being tenant in possession, might, by surrender, determine his old lease, and take a new one when he pleased.

It is objected that in case of a Bishop, as it was adjudged by all the Justices of England, a concurrent lease is good, (*k*) *viz.* if a Bishop make a lease for twenty-one years, and eight or fewer of these years being spent, he makes a second lease to another for twenty-one years, to begin from the making, this is a good lease, if it be confirmed by the Dean and Chapter; and he and his successor shall have the rent accrued during the remainder of the other lease: and all this is to be agreed. But if there were an attornment, whereby the present rent and reversion, as a reversion, would pass, then that lease would be void as is agreed in Elmer's case: for then the lessor, and his successors, could not distrain the present tenant; and although, *ex vi termini*, it is payable yearly, because he may distrain when the second lease comes in possession; yet it is not payable within the meaning of the act, unless there were a continual revenue, yearly payable by coercion of law, and not in expectancy, or *in futuro*.

Moore 107. Co. Com. 45.

4 Co. Rawlins.

5 Co. 2. Elmer's case.

But to this objection, that a concurrent lease by a Bishop, confirmed by a Dean and Chapter, is good (which I grant), I give these answers:—

First, That which I mentioned before, that instances upon 1 Eliz. or 32 H. 8., concerning sole corporations, are not to be matched with cases of corporations aggregate, grounded, not upon those, but upon other statutes.

But, secondly, That the words of 1 Eliz., which restrains and disables Bishops to make leases other than for the term of twenty-one years, or three lives from such time as any such grant or assurance shall *begin*(*l*) (as it is in Rastall and Moore), or *be given*, *viz.* *datum* (as it is in Co. Com.) whereupon the old and accustomed yearly rent, or more, shall be reserved, and payable yearly during the said term, doth not at all restrain leases in reversion.

Moore 107. Co. Com. 44 b.

(*k*) Fox and Collier's case; accurate reports of which are printed in the Appendix F. from Manuscripts in the British Museum. Sir Orlando Bridgman, and the report in 1 Anderson 66., appear to differ as to this case having been carried by one or two voices only of the Judges.

(*l*) In the recent parliamentary edition of the Statutes, it is printed "begin."

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The 1 Eliz. is a disabling statute, and must be construedstrictly.

Thirdly, 1 Eliz. of Bishop's leases was a restraining and disabling law, and restrained them of that power which they had (together with the Chapter) at the common law; and shall be taken strictly and according to the letter, to restrain them no further as to reversionary leases. Which also was the reason why such leases were good upon 13 Eliz. contrary to the true though not the legal intent of it; for the words of it were "other than for the term of twenty-one years, or three lives from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term:" and such leases in reversion are not restrained by these laws. But in our case, the intent of 14 Eliz. was to enlarge their power in some things wherein they were restrained by 13 Eliz., but with a condition of restraint in some things not provided for by 13 Eliz., as touching leases in reversion and covenants for repair; and therefore the clause of restraint must have as large and benign interpretation as the enlarging clause.

I have, for my own satisfaction, searched into and seen the record of that act of parliament 1 Eliz.; and I find it to be as it is in Rastall and printed in Moor's Reports, "other than for the term of twenty-one years or three lives from such time as any such lease, grant, or assurance shall *begin*, and whereupon the old and accustomed yearly rent or more shall be reserved and payable yearly during the said term of twenty-one years or three lives." If that act should be construed, as my brother Browne would have it, literally upon the force of the word "*begin*," from which he makes his objection; then, if a Bishop make a lease for twenty-one years or three lives, he may make a lease for twenty-one years to begin from the end of that former lease for twenty-one years or three lives, rendering the old rent, and so another lease for twenty-one years to begin from that second lease, and so *in infinitum*. And these shall be good, if confirmed by the Dean and Chapter; for such leases are but for twenty-one years from such time as such leases shall begin, which is within the express words of the act of 1 Eliz.; for the time of beginning of every such lease is expressed to be the end of the former lease, and to continue but twenty-one years. And such leases, by way of future interest, are more allowable within the letter of 1 Eliz., than concurrent leases, which commence only by estoppel at the first making of them.

If the law were thus, it doth not, as I conceive, concern our case upon 14 Eliz. But if it did, it would follow that a Dean and Chapter might make leases of houses in cities and corporations by 14 Eliz. for forty years, to commence after the ex-

piration of a former lease; which I suppose will not be affirmed; for, *ex consequenti*, they may make such leases *in infinitum* to be *in esse* by way of future interest at one time, contrary to the express words and intent of the statute.

But I hold it somewhat clearly, that if a Bishop make a lease for twenty-one years, and eight or fewer of those years being expired, he makes a second lease for twenty-one years *to begin from the end* of the former lease, rendering the old rent, though this be confirmed by the Dean and Chapter, and be but for twenty-one years from the time that it shall begin, it is void within the meaning of 1 Eliz.: and the statute intends no other lease than such as shall begin from the making; for the statute saith, "other than for twenty-one years or three lives" in the disjunctive, *ergo* it shall not be both for twenty-one years and three lives in being; that is one reason given in Elmer's case both in my Lord Coke and Moor's Report of it. The intent of the statute was, not to tolerate two leases *in esse* at one time—one for years, another for lives—for being in the disjunctive, both cannot be *in esse* by the statute at one time. And the same reason holds also that there cannot be two leases—for twenty-one years and for twenty-one years to begin after that twenty-one years—both within the statute of 1 Eliz., at the same time.

5 Co. 2. Moor 253. Co.Com. 44 b. Cr. J. 112.

And therefore since the making of 1 Eliz., which is now above one hundred years, it hath been always taken and practised, that the leases by virtue of that statute must be made to begin from the making; and also, that "the statutes (*m*) of 1 and 13 Eliz. must follow the pattern of 32 Hen. 8. in the eight properties or qualities of it (the concurrent lease only excepted): and, therefore, although neither 1 nor 13 Eliz. appoint the leases to be by indenture, or prohibit them to be without impeachment of waste, yet 32 Hen. 8. is made a pattern for that purpose." And so if it be not a concurrent lease (which is a lease to begin from the making and concurrent with the present lease in point of time,) the old lease must be surrendered or expired within a year (and by 18 Eliz. c. 11. within three years) of the making of the lease. And since the statute of 1 Eliz. there never grew any question whether any lease by way of future interest by a Bishop upon 1 Eliz. were good, but only whether a concurrent lease, beginning at the time of the making, were good. But the concurrent lease, being only for twenty-one years to begin presently, and so several leases for twenty-one years and twenty-one years not being out at once, hath been adjudged good by the common

Co.Com. 44 b.

(*m*) Co. Litt. 45 a.

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law (as not restrained by 1 Eliz.) if it be confirmed by Dean and Chapter. But that rests upon the particular reason of the exposition of the statute of 1 Eliz.; the words whereof, as I said before, wholly differ from our case upon 14 Eliz., wherein *all leases in reversion* are expressly prohibited. And such is our lease to Sir Richard Wyn in truth, though, if the statute had not been, it would have been a lease by estoppel at the common law, during the continuance of the first lease. I have been the longer in this, lest any mistakes or new opinions should be raised upon the words of 1 Eliz., the misconstruction whereof (as it hath been urged and applied) would in effect make void the statute of 1 Eliz., and give to them that power, which is not fit to be given to any ecclesiastical persons, to make leases for years upon leases for years *in infinitum*, to begin one after the other; which was never practised nor intended. To which also agrees the authority of parliament of 1 Jac. c. 3. which recites, that by the laws and statutes of this realm "no Bishop can make any estates whatsoever of any of his possessions to any subject whatsoever, other than for the term of twenty-one years or three lives, with such reservations of rent, and in such manner and form, as by the laws and statutes are provided." It saith "for the term of twenty-one years,"—not "for the terms—or two terms," of twenty-one years.

The case 8 Eliz. Dyer 246., (which is there put as a doubt), tenant in tail makes a lease for twenty years to begin at Michaelmas next, rendering the old rent, was adjudged a good lease in the Exchequer, as was reported by Coke, then Solicitor-General, and agreed *post*, 34 Eliz. B. R. in Tomson (*n*) and Trafford's case by the Court, as I have seen in a report of that case.

And I hold it good in law within the very words of 32 Hen. 8. c. 28., which gives power to tenant in tail to make leases for term of years indefinitely, "as if he were seised in fee simple; provided it extends not to leases of lands in the hands of a farmer by virtue of an old lease, unless the same be surrendered, or expired, within a year after making the new lease; nor to a grant of any reversion of any lands, nor to a lease above twenty-one years from the day of the making, and that there be reserved yearly during the same lease due and payable the accustomed rent, &c." This lease is not within

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(*n*) In the margin of the edition of Dyer, published since the time of Bridgman, such lease is stated to have been adjudged good. Carter, p. 15., reports the Chief Justice to have said on this point that the lease was *not* good, and that so it was resolved in the Exchequer. The whole passage in Carter is obviously erroneous.

the restraint; it exceeds not twenty-one years; it is not *of a* reversion, but *in* reversion, or future interest; and there is no lease then in being, or (if there were) yet no lease in being which expires not within a year. But it is a clear case, if a lease be made by tenant in tail (there being a lease for three or more years *in esse*) for twenty-one years, rendering the old rent, that lease is not good; or by a Bishop, that lease is not good by 32 Hen. 8.: and so is resolved in Collyer and Fox's case; and therefore it must be confirmed by the Dean and Chapter. And therefore the case of tenant in tail no way concerns our case, unless it had been put of a lease, not "at Michaelmas next," but three or more years after another lease in being; and then it had been naught.

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Co.Com. 45 a.

But if tenant in tail, being actually seized of lands formerly demised, shall make a lease for ten years, to begin ten years hence, reserving the old rent (there being no lease then *in esse*) I know no cause (*o*) why it should not be good, for it is within the affirmative and enabling clause, and the disabling clauses reach not to it. Neither is it inconvenient to those who have the inheritance; for, till the lease begin, they have the land; and when it commences it is less than twenty-one years, and they have the original rent. But if a Bishop should make a lease for ten years of lands, then in his hands, but formerly demised, to begin ten years hence, rendering the old rent, (to which I conceive he is enabled, as well as tenant in tail, by 32 Hen. 8.) whether it be not restrained by 1 Eliz. totally is not now our present question, nor can it be in reason compared to our case of a Dean and Chapter, who were not comprised within 32 Hen. 8. And, I take it, it is expressly prohibited as to a Dean and Chapter, by 14 and 18 Eliz.; and besides our case is where there is a lease *in esse* at the same time, and not where the lands remain in the lessor's hands.

And this gives some answer to the objection made from Tomson and Trafford's case, Mich. 33, 34. Eliz. B. R. which is the case relied on by my brother Browne; to which it is sufficient to answer, that it is an imperfect report; and upon view of the record it appears not to have been ever adjudged. But to give more particular answer; the Reports which I have seen of it (one whereof was lent me by my brother

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(*o*) Some difference of opinion has existed on this point. See Co. Litt. 44. a.; Machil *v.* Clarke, Salkeld 620.; Chambers on Leases, 231. 254. In Bacon's Abridgment, tit. Leases (D. 2.) Vol. IV. p. 33. the doctrine here stated by Sir Orlando Bridgman, is conjectured to be law. Both copies of the manuscript agree word for word in this part of the text.

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Popham's Rep. 9.

Browne) are somewhat imperfect. Some of them mention it to be a lease of lands (*p*), and not of houses: and so it is not within 14 Eliz. yet they mention it to be for forty years, which must be only within 14 Eliz. Again, in the opinion of Popham, there delivered, the lease is recited to be for years "*a confectione*," whereas no such words are in the statute of 14 Eliz., and therefore the distinction put in that case between a lease in reversion and an interest in reversion is but interlocutory, *obiter*, and upon a sudden; and upon a mistake in putting the case; (*q*) and is denied by Fenner, and before him by Wray, whilst he lived, as appears by those very Reports. But the principal case, and whereupon it was resolved, is clearly good law. The Master and Scholars of Magdalen College, 8 Eliz. make a lease for twenty-one years to J. S., and after 13 Eliz. they make a new lease to him of the same lands for twenty years, to begin at Michaelmas next. The great question was,—whether this was a surrender of the first lease before Michaelmas, immediately by the making of the new lease. It was adjudged to be a present surrender, though the second lease was not to begin till Michaelmas after; for that the lessee did admit the lessor to have power to contract for the twenty years, which he could not, unless it did amount to a surrender of the old lease. So that then the case was no more but the Master and College being in possession, make a lease for twenty years to begin at Michaelmas next rendering the old rent. This lease is clearly good (I do not say within the 14 Eliz.); but within the 18 Eliz., which is sufficient; for if it fall not within 14 Eliz., it falls within 18 Eliz., as I have argued before; for it is less than is allowed by 18 Eliz. And I hold it good if there had been a lease *in esse* till Michaelmas, for the statute 18 Eliz. makes good leases where the old lease expires within three years. But it is stronger in Tomson and Trafford's case; for there the Master and College themselves, by the surrender, had the possession till the lease took effect: but it differs from our case in these two respects. First, that was a lease but for twenty years, and so enabled by 13 and 18 Eliz., if not good by 14 Eliz., which ours is not, being for forty years. Secondly, there was no lease to any other in possession at that time: it was no lease by estoppel, but interest: in our

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(*p*) In 2 Leon. 188. the lease is stated to have been of a mansion-house, and at the first granting for twenty-one years, and afterwards to the same lessee for twenty-one years.

(*q*) "In this case of Wyn *v.* Wild, the Court denied the *opinion* in Tomson and Trafford, Poph. 9."—Ventris 246.

case it is good only by estoppel. And, thirdly, the argument which is drawn from Tomson and Trafford's case goes to prove that the Dean and Chapter might make a lease good by way of future interest; and there my brother Browne's opinion must be, that a lease may be made by way of future interest for forty years, which is much worse for the church than a concurrent lease; and as I have proved before was not allowed even in the case of Bishops, upon 1 Eliz. though confirmed by Dean and Chapter: *a fortiori* never intended by 14 Eliz., which, by express words, prohibited generally leases in reversion; which words not being before in any statute, I conceive were put in purposely because they saw the mischief of making leases in reversion after 13 Eliz., though the words thereof were, that the leases should begin from the time of the making. So that I conceive the authority of Tomson and Trafford's case doth no way touch our case. As for the distinction there put by Popham *obiter*, between a lease in reversion and a future interest, I have by express authorities already proved it to be none at all.

If the distinction had been a lease *in* reversion, and a lease *of a* reversion, it had been good, agreeably to the difference taken before Co. Com. 44., and agreeably to 32 Hen. 8., which expressly distinguisheth them. For it provides against leases of lands whereof any former lease is in being not ended within a year, which is a lease in reversion: and after expressly provides against leases of any reversion; that is, where there is an attornment or a bargain and sale whereby the rent passed to the grantee. And the reason pitched upon by Popham for his difference is, because the statute saith the lease shall not be above forty years *a die confectionis* which reason indeed reacheth to the penning of 1 Eliz. or 13 Eliz. for twenty-one years: but he utterly mistakes the words of 14 Eliz. And whereas he puts this case—if a college makes a lease for ten years, and after makes a lease to another for ten years to commence after the end of the first lease, rendering the rent, &c. That this is a good lease upon the reason that there is no more than twenty years *a die confectionis*; and that the intent of the statute is only that they should not be charged with a longer continuance of the lease. It manifestly appears that he or the reporter was mistaken, for the statute 18 Eliz. is positive that all leases by the said Deans and Chapters, Colleges, &c. of any of the said lands whereof any former lease is in being, not to be ended within three years next after the making of any such new lease, shall be void, &c. So that I hold it very clear that a lease by a college, &c. for ten years,

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after the expiration of a term for ten years to another in being, is void by the statute of 18 Eliz., and not warranted within 14 Eliz.; and that such a lease by a tenant in tail is not warranted by 32 Hen. 8., as I said before; *a fortiori* by ecclesiastical persons upon whom there are such restraints.

So that for this first great point, upon the whole I conclude that leases of houses, by Deans and Chapters, if not warranted by 14 Eliz., they fall within the restraints of 13 and 18 Eliz.—That this lease to Sir Richard Wyn for forty years is, in truth, but a lease for twenty-three years, to begin seventeen years after; and that it is by estoppel only a lease for forty years.—That, setting aside the estoppel, it being but a lease for twenty-three years, to take effect seventeen years after, it is a lease in reversion within the letter of 14 Eliz., and prohibited by it; and that the estoppel binds not against the statute, or the successor, or to the prejudice of the former lessee.—That the intent of the 14 Eliz. was more for the advantage of the present lessees or grantees than the church, (being an enlarging statute) *viz.* that new leases should not be made over old tenants' heads.—That the cases of concurrent leases by Bishops upon 1 Eliz., and other cases upon 32 Hen. 8. are not to be resembled to cases upon this statute of 14 Eliz.—That the prohibition of a lease in reversion by the 14 Eliz., which expression is not in any of the statutes of 1, 13, or 18 Eliz. cannot be intended only to reach to a lease of a reversion: but that every lease which is not in possession is in reversion, though not of a reversion;—and therefore this lease made to Sir Richard Wyn is not warranted by 14 Eliz., and consequently void by the statute of 13 Eliz., as being for a longer term than twenty-one years; and also by 18 Eliz., as made above three years before the expiration of the former lease.

And this is warranted both by the constant practice of making concurrent leases within three years before the end of the old leases of houses in cities, &c., and not before; as hath been informed by those who have daily experience of what is done in that kind, and by the express resolution of Hunt and Singleton's case, Pasch. 39 Eliz. C. B. where the case was; they found by special verdict that the Dean and Chapter of St. Paul's made a lease for forty years of a house in London, then in lease for ten years to a stranger; and it was held by the whole Court, without argument, that the lease was merely void by 13 Eliz., not warranted by 14 Eliz. which made leases of houses in cities for forty years, so as it be not made in reversion of any other lease: for although this lease is to commence

3 Croke 564. or Cro. El.

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immediately, yet it is in law a lease in reversion, and therefore within the words of the statute; and therefore it was adjudged accordingly.

These are the very words of the book. I have taken a copy of the record itself, which I find agreeable with the printed case, 3 Croke 473.; and it warrants the judgment for the plaintiff against the reversionary lease. But in truth there is another point in the case,—whether by the words of the second lease any more passed, or was intended to pass, than was in possession of Eales, the grand lessee; other part being in possession of Roberts, a sub-tenant:—but the report proves the judgment was given, because it was a future interest, or lease in reversion. And my Lord Coke's report of it (*r*) is to another purpose; yet shews the question and resolution grew there, upon a lease not warrantable by 13 and 14 Eliz.; and that it was void against the successor, not the Dean who made it; which is an evident proof that the judgment in that case was grounded upon the statutes, agreeable to the report of it by Justice Croke, and not upon a bye point.

Int. 38 El. Rot. 1814.

Cro. Eliz. 564.

Some exceptions have been taken against the finding the acceptance in the verdict.

As, first, it is not found of whom Dean Earle and the Chapter received the rent:—but it is expressly found, that they received the rent due upon that lease to Sir Richard Wyn; which must be understood either from him or his executors. But if of a stranger, it appears Maurice Wyn, his executor, agreed to it, *et omnis ratihabitio*, &c. (*s*)

Secondly, the acceptance of a year's rent at Michaelmas 1660, when Dean Earle was Dean but for one quarter of the time, is not good. I answer, first, if it was due before he was Dean, it alters not the case: for if a rent be due to a Dean and Chapter, and the Dean die, it is payable to the successor Dean and Chapter, and the executor of the last Dean hath nothing to do with it: and, secondly, if there were but one quarter's rent due to him, the acceptance of that is an affirmance of the lease. It is true, the acceptance of a rent where none is due will not bind: that was the reason the acceptance of the rent upon a lease for three lives, by the successor, of tithes, in Rickman and Garth's case, the rent being due by contract only, bound not. But in our case, if all had been due before the new Dean came in, yet it was a rent, and acceptable.

Cro. Jac. 173.

The next point is:—Taking it, as I have argued, that this lease is not warranted by 14 Eliz. and to be void by 13 Eliz. and 18

(*r*) Cited 3 Rep. 60.

(*s*) *Omnis ratihabitio retrotrahitur, et mandato sive licentiæ æquiparatur.*

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Eliz. ; yet, whether an acceptance of rent by the successor Dean and Chapter will not make it good during the time that the same successor continues Dean? (for it is found that Dean Earle and the Chapter accepted the rent, and that Dean Earle and the Chapter made the new lease to the lessor of the plaintiff:)—and I conceive that an acceptance of rent by a successor Dean and Chapter, before an entry to avoid the lease, will make the lease unavoidable by the same Dean and Chapter, or the lessee claiming under the same Dean and Chapter.

First, I am of opinion that, though 13 Eliz. make leases not warranted by it to be "utterly void and of no effect, to all intents, constructions, and purposes, any law, custom, or usage, to the contrary notwithstanding;" and 18 Eliz. hath the very same words of leases not warranted by that statute; yet the present Dean and Chapter, who made the lease during the time of his being Dean, shall not avoid it. For the acts principally looked at the benefit of the successors *in those clauses*, and not the grantors. So it was resolved, Pasch. 39 Eliz. C. B. in

10 Co. 59.
11 Co. 53.

Hunt and Singleton's case, cited 3 Co. 60. in Lincoln college. And it is agreed by all the Justices in Magdalen College case, in the case of a Master and Fellows of a College; and said to have been often resolved before that time. And 11 Co. 78. it is one of the principal points there resolved, that if a Master and Fellows convey away their lands since 13 Eliz. and a fine be levied by the grantee, that the successor master shall have five years after the death of his predecessor to make his claim; for the conveyance, during the life of the Master, cannot be avoided. And this resolution was not then taken up, but

Moor 875.

agreed to several times before: Pasch. 10 Jac. (*t*) Walter against the Dean and Chapter of Norwich, otherwise Walter *v.* Dean of Norwich. They made a lease to him for three lives, a remainder of a long term for years then being *in esse*; with an express covenant to enjoy it against that lease. In an action of covenant brought by him (upon the eviction by that lessee), it was adjudged that the action of covenant would lie (though the covenants be made void by 18 Eliz.) because the lease was good during the life of the Dean who made the lease, and consequently the covenants depending upon it. And

Co.Com.45.a.

my Lord Coke held the law to be so in his Commentaries, the last of his works which were published by himself.

39 H. 6. 13, 14. cited 10 Co. 33. b. in Sutton's Hospital case,

The objection that was made against this, was made in that "a Dean and Chapter cannot have a predecessor or successor."

(*t*) 1 Brownlow 21. 2 Brownlow 138. Ow. 136. 2 Roll. Ab. 9. S. pl. 2. Winch. Entr. 159.

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case of Lincoln college, that a Dean and Chapter, and Master and Fellows, are corporations aggregate, and never die. That the successor Dean is not successor to the entire corporation, but a principal member of it: and, therefore, if the corporation cannot avoid it at first, they should never avoid it. And, I must acknowledge, that in Lloyd and Gregorye's case, Justice Jones and Justice Barkeley were of that opinion: and Justice Jones cited Sir John Trevor's case, 4 Jac. to be ruled accordingly. And in Dumport's case, as it is reported by Justice Croke, a lease was made by the President and Scholars of Corpus Christi College in Oxford, wherein (the ancient rent being 33*s.* 4*d.*) only 22*s.* was reserved. And it is said, the whole Court was of opinion that this lease, being void by 13 and 18 Eliz., was for that case void against the lessor himself. But the printed case of Lloyd and Gregory (*u*) makes no mention of this opinion, neither doth my Lord Coke's report of Dumport's case; and both the cases were adjudged upon other principal reasons. And therefore having so great a weight of solemn resolutions and judgments, and the practice and opinion of later times concurring, I hold it not safe to question again that point so long settled.

3 Croke 816. Pasch. 43 Eliz. B. R.

Though the truth is, it is adjudged and settled agreeable to the reason of the common law and ancient authorities of our books, it is not denied by any but that the words of a statute, that such a thing shall be void, do not in all cases make it void *simpliciter*, but *secundum quid*, or *quoad* such person, or to such purposes. And the difference generally holds between the making void of a thing by act of parliament, as appears by all the cases cited in Lincoln College case, and 5 Co. 119, Whelpdale's case, and that which is void by the common law: and to this point there is no difference between a lease for years and for life, as was objected. A bishop makes a lease for years, rendering rent not warranted by 1 Eliz.: the successor's acceptance makes it good, for it was good at the common law; otherwise, if a prebend or parson make such lease. So here the lease of the Dean and Chapter was good at the common law. The words of 1 Eliz. and 13 Eliz. and 18 Eliz. touching leases not warranted by those statutes are the same; and such a lease made by a bishop or single ecclesiastical corporation, though the statute have the same words, is not void against the bishop, prebend, &c. who made it. The very same reason holds in a body aggregate, that it should not be void during the life of the Dean who made it, being the head of that body; for the change of the head of the corporation aggregate hath in law

Qualified construction of general words in acts of parliament.

(*u*) Cro. Car. 502. 1 Jon. 405.

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the same effect, to most purposes, as the death of a common person or sole corporation. I know some difference hath been put between a corporation, all capable (as a Dean and Chapter, master "and scholars" of a college, mayor and commonalty, &c.) and abbot and convent, the convent not being capable: but to this purpose the cases will be alike. The law looks upon the Dean or Master as the head; and though a body corporate aggregate, as such, are invisible and immortal, yet they are made up of single persons; and their natural actions, (as receiving, paying, accepting, and the like,) are individual and personal actions; and therefore the law looks upon them in such cases with respect of their natural as well as politic capacities.

Cr. Jac. 112. All Souls' College case is not in print. 41 E. 3. 23. 5 E. 3. 13. 1 E. 5. 5. 13 Hen. 8. 13. 2 R. 3. 6, Hughes 1. pt. 468.

The Dean and Chapter are one thing, and the Dean another in person and possessions: yet the Dean and Chapter cannot present the Dean to a church: but they may present one of the Chapter; for it is no perfect corporation without the Dean, as it is without the Chapter. And, therefore, a gift or alienation to the Chapter, the deanery being void, is not good as is agreed in Ayre and Orme's case: so to a mayor and commonalty, the mayor being dead. But it were good to the Dean and Chapter, mayor and commonalty, though the deanery be void, by way of remainder, vide 32 E. 3. Aid 39. cited 10 Co. 31. If the Dean receive and make an acquittance for rent justly due, this is a good payment. And so it is adjudged, 2 R. 3. 7. (*x*) An acquittance by the mayor alone was not good as the deed of a corporation; (for so that case must be intended). But yet his acquittance was allowed as a good receipt for the rent then due; and one hundred like acquittances were then produced. And so in time of the vacancy of the Dean, the Chapter may receive the rent; though it be a question in Dyer. But in the time of the Dean one of the Chapter cannot receive it, to conclude the church (*quære hoc*). So that the law in the case of a corporation aggregate respects the head; and his acts during his life shall in many cases and respects bind the corporation.

14 H. 8. 2.

5 Eliz. 222. Moor 52. Co. Com. 264. If the Dean receive and make an acquittance for rent justly due to the Dean and Chapter, this is a good payment. 2 R. 3. 7. Yet a Dean cannot demand a rent due to the Dean and Chapter.

F. 6.

Secondly, I hold that though the Dean who made the lease cannot avoid it, yet it is void against the successor Dean, and the same Chapter: but still not *simpliciter*, but *secundum quid*, if they will avoid it, not otherwise. For otherwise they should be in worse case than a successor of a bishop, or other single corporation, who may make it good if they will by acceptance of rent, or the like, notwithstanding the words of the act are that it shall be void. And it may be much more for their advantage to continue the lease at the rent reserved, and the covenants

(*x*) 2 R. 3. 6.

to repair and the like, than to be forced to keep it in their own hands whether they will or not. 1662. LYN v. WYN.

In Lincoln College case it is said, that the successor *ceo poyent avoider*, "may" make it void; not "must" make it void whether they will or no. And so 11 Co. 73. the words are *ceo ne serra void per le master mesme, mais per son successor:* the words are, not "it shall be *void*," but that "it shall be *voided by his successor.*" A Dean and Chapter have a fee simple estate, but restrained by the statutes; and their leases are void as to a successor, if he will avoid them, and not otherwise. 3 Co. 60. 11 Co. 73.

Thirdly, I hold that the acceptance of the rent by a successor Dean shall not make good the lease, though it were by his deed: *a fortiori*, by his bare receipt and acceptance of the rent. This is the last and express resolution in Magdalen College case where, it is said "it was not thought worthy a question." The difference is, where it is due and payable, the acceptance by the Dean excuseth the lessee" But the corporation being aggregate, and he but one of it, the Dean or Master cannot by his single act divest any right or interest, or declare the election to make it void or not, or conclude or estop the corporation. In the other case the Dean was but as a bailiff to receive the rent, and such a one they might appoint without deed: but such a bailiff, without express warrant for that purpose from the Dean and Chapter, cannot accept a rent to make a voidable lease good, no more than he can enter for a condition broken. And it differs from the case of *Wheeler and Danby*, (x) where there was a command precedent to the bailiff, and an acceptance by the bishop himself of the bailiff. 13 H. 8. 13. 11 Co. 79. Though in strictness of law, it is not good. 13 H. 8. 13. 2 R. 3. 2 H. 7. 27. (y) Dyer 222. 5 Eliz.

But, fourthly, it follows, if the lease be not void against the successor Dean and Chapter *simpliciter*, but *secundum quid*, if they will, that the new Dean and the Chapter may, by their acceptance of rent, make it a good lease during the time of that successor Dean. For the reason is the same as of a bishop; the acceptance of the rent by a successor Bishop binds him, and not another successor. And the words of 13 (touching the lease being void) and 18 and 1 Eliz. being the same, the law ought to be the same. The statutes principally intended benefit to the successors who would avoid it, and not to those who would make it good: so that the objection, that because the corporation never dies, that therefore either it must be void *ab initio*, or not at all, holds not: for it shall be void only against the successor Dean, who accepts the rent, and the Chapter; but not against his successor.

The objection that the Dean and Chapter are disabled by

(y) 1. 7. 27. (z) Cro. Car. 95. cited.

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14 Eliz. to make the lease, and then it is totally void, hath been already answered; for the statute doth not disable them at all: it is not generally that no lease shall be permitted to be made, but that none shall be permitted to be made by force of this act in reversion.

Secondly, admit the Dean and Chapter are disabled to make leases contrary to that act; yet it is but *secundum quid*, not *simpliciter*, as is agreed in Magdalen College: that is, they are disabled to make them so as to be indefeasible by the successor, but not that they shall be void whether the successor will or not. That may be to the prejudice of the successor as to arrears, waste, and many other ways. Priest's case, (*aa*) which was cited, and the case of simony not like it. If the act of the head of a corporation aggregate only, as a Dean, Master of a College, &c. do, in many respects, bind the corporation during the Dean or Master's life; *a fortiori* the act of the Dean or Master with the corporation, though otherwise avoidable in law, shall bind so long as he continues head.

This only difference there is in the cases. The acceptance of rent by the successor Bishop, as being a sole corporation,

11 Co. 79. without any deed, makes the lease good against him: but a corporation aggregate, being as a corporation invisible, they cannot speak or act, but by deed; especially in great matters, such as are the divesting a right or interest, the estopping or concluding themselves from entering to avoid a lease. And, therefore, they must accept their rent, either by acquittance under their chapter seal, or by letter of attorney, enabling their receiver or other person to receive it, or some matter tantamount appearing by deed; or otherwise their acceptance concludes not. The books are full in it, that a corporation ag-

Cooper v. Goodright, 3 Cro. 862. gregate can do none of these things without deed. A deed of grant of rent in fee to the Master, &c. of Emmanuel College, was delivered to a stranger to their use, without a letter of attorney; they sealed the counterpart of it: that was a sufficient agreement, as well as if they had made a letter of attorney. And if they had not sealed the counterpart, but brought an action upon the grant of the rent, that had made the grant perfect.

H. 45 Eliz. Gerard against the Dean and Chapter of Chester (*bb*), and Sir Miles Sandys' acknowledgment of a deed in the Chapter House, without letter of attorney, is good, *quod capitulanter congregati*.

12 H. 7. 27. 1 E. 55. 11 Co. 79. Mag. Coll. So mayor and commonalty coming to the bar, may make an attorney without seal, *quia* recorded. But if a Dean demand a

(*aa*) Priest's case, 1 Jon. 334. Litt. 238. 302.

(*bb*) Gerard *v.* The Dean of *Rochester* and Sands, Mo. 676. Hill. 45 Eliz. in Canc. 14 Vin. 445. pl. 4.

rent in the Chapter-house, or elsewhere, without authority under seal of the Dean and Chapter, it is not good. 1662. LYN v. WYN.

And, therefore, the only and last thing considerable is, whether as this verdict finds the acceptance of the rent by Dean Earle and the Chapter, it shall be understood the acceptance of it was by deed. The words are, *Quod postea, scilicet, 26° Oct. 1660, prædictus Johannes Earle, tunc et adhuc Decanus Ecclesiæ prædictæ, et capitulum ejusdem Ecclesiæ recipiebant 53s. 4d. pro redditu messuagii prædicti cum pertinentibus, pro uno anno finito ad festum Sancti Michaelis Archangeli tunc proxime præteritum, super prædictam indenturam præfato Ricardo Wyn, ut præfertur, factam in formâ prædictâ reservato:* and I hold that the Jury, having found that the Dean and Chapter received the rent reserved upon the said indenture made to Sir Richard Wyn, that it must be understood that they received it by deed, otherwise they could not receive it; and it is frequent to have stronger intendments than this in verdicts.

Nay, in pleadings, such an intendment is allowable, *where several acts are to be done by the same party. As, if a feoffment be pleaded feoffavit, it implies livery. Revocavit, implies notice as well as a deed of revocation*, 8 Co. 82. Viner's case; and a feoffment to a corporation may be pleaded *feoffavit*, although livery cannot be executed to them but by a letter of attorney made from them: but all necessary circumstances shall be intended to be executed. In 14 Jac. B. R. (*cc*) The Bailiff and Commonalty of Ipswich's case, 2 Cro. 411. and 2 Coke 61. Wiscott's case. Declaration in *Eject. Firmæ* upon a lease by baron and feme (without saying it is by deed) is good after not guilty pleaded: for though it is not alleged to be by deed, it may be, and so shall be intended to be by deed; and the Jury in their verdict shall be understood to find it so.—Note, there is a great difference where there is a special conclusion: the rest shall be supplied by intendment; but not where it is *super totam materiam in fo. præd. compert.* as here.—Tr. 20 Jac. C. B. an advowson was let for twenty years. The lessee covenants not to alien, without the assent of the lessor, and in covenant the breach was laid for aliening without the lessor's assent, and issue upon it; and found for the plaintiff. And it was moved, the advowson could not be aliened but by deed, which was not alleged: but it was adjudged it shall be intended by deed. Hughes, parte prima 489. out of Winch 34; *quære hoc, et vide* 2 Cr. 613.

And in Justice Croke's Report of Dumport's case upon the special verdict, that the president and scholars of Corpus

(*cc*) 3 Bulst. 211. 1 Roll. Rep. 404.

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Christi College made a lease to the plaintiff in *ejectione firmæ*, and a warrant to Eglesfield to enter and deliver the lease upon the land, and that Eglesfield entered in their name, and delivered the lease upon the land to the plaintiff; it was held that this lease was not good, because it was not found that the warrant was by writing under their seal (and yet they could make no warrant to enter but by writing,) and judgment was given for the defendant. But there were other causes also of that judgment, as appears both in that report, and in the report of it by my Lord Coke.

4 Co. 65. b.

Fulwood's case is *in eject. firmæ*, the title being upon an extent upon a recognizance, in the nature of a statute staple according to the statute 23 Hen. 8. The verdict finds, That Castle came before the recorder of London, and mayor of the staple, and *recognovit, &c. debere* to Rivett 200*l.*; and says not, either *secundum formam statut.* or *per script. obligator.*, whereas it could not be but by bill obligatory sealed with three seals. But because it was found to be a recognizance before the Recorder and Mayor of the staple, who could not take a recognizance, but according to the statute, it was adjudged a good verdict. There is, I confess, another reason given, that all the sequel of the verdict implies that it was a recognizance in the nature of a statute, and that it was found that execution was upon it in Chancery; which could not be, unless it had been acknowledged *secund. form. statut.*; and the statute itself must be there produced. But still all that must rest upon implications and consequences.

Co. 51.

The Earl of Shrewsbury's case. The Earl of Rutland brought an action on the case against Spencer, &c. for exercising his office of steward of the manor of Mansfield, and hindering him to exercise the said office, and to have the profits thereof. Upon not guilty pleaded, a special verdict is found, wherein after finding the title of the stewardship to the Earl of Rutland, and of the manor to the Earl of Shrewsbury, they further find, that 16 Feb. 44 Eliz. being the day in the declaration, Simon Sterne, then being deputy to the Earl of Rutland, (for it was adjudged he might make a deputy,) came to the town of Mansfield to keep a court baron, and finds the disturbance, &c. One objection to the verdict was, that they found not Sterne to be deputy by deed as it ought to be, 28 H. 8. Deputy 17. To which it was answered and resolved that, true it is, he who makes a deputy ought to do it by writing: but when the Jury found that Sterne was his deputy, all necessary intendments are by that also found; and, therefore, upon the matter they have found that it was by deed.

It was objected by my brother Archer, that lately in the

Exchequer there was a declaration in an ejectment upon a lease by a corporation; and it did not declare that the lease was by deed; and upon not guilty, and verdict found for the plaintiff, judgment was arrested. If it were so, it comes not to our case; for there the omission was in the declaration of the party; ours is in the finding of the Jury. But yet I am not well satisfied that the judgment was well arrested upon the authorities of Westcott's case, and that case in the Common Pleas.

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And see for the like intendments my Reports; and Dyer 174, 362, 167. cited by Justice Browne; and 28 Ass. pt. 3. and br.(*ee*) verdict 39. in an assise of rent the tenant pleaded to the assise; and they found a grant of a rent and attornment; *tout ne soit nul especialtie de ceo matter del part le plt. uncore il recovere*; for it shall be intended that the Jury had evidence of such a grant by deed.

(*dd*) This case is dated 1662 with reference to the roll; and to Ventris, p. 246: but the judgment was probably delivered earlier, as the *printed* reports of Moor are cited in it, p. 138; and the first edition of that book is dated in the title page 1663.

(*ee*) "*Le pl. rec., non obstant que le pl. monstra especialtie de ceo, qd. quere.*" Brook, *ib.*

BOSWORTH *v.* FORARD. (*a*)

Tr. 10 Car. 2. Rot. 1746.

(On the construction of a jointuring power in a settlement of lands.) 1666.

BRIDGMAN, C.J.

An action of trespass and ejectment is brought by John Bosworth against Richard Forard, upon the demise of Basil, Earl of Denbigh, and Elizabeth his wife, for a third part of the hundred of Huntspill, and divers other manors and lands in the county of Somerset. Upon not guilty pleaded, the Jury find— Harg. MS. No. 58. fol. 40. Ejectment for lands, A. Special verdict.

That William, Earl of Bath, was seised in fee of the manor, tenements, and lands in the declaration; and also of the manor of Hunt's Court, with the appurtenances, in the county of Gloucester; and of the hundred of Baunton, in the county of Devon; *ac de* William, Earl of Bath, seised in fee of lands, A., B., C., D., E. and F., levied a fine thereof. Hil. 6 Jac. 1. to such uses as he should appoint.

(*a*) "Argued per *Barones* 22 *et* 33 Maii, 1666; and the Court divided." Harg. MS. No. 58. pl. 40. In Carter 96. this case is reported to have been heard in the Common Pleas, where the Court was divided; and to have been afterwards heard in the Exchequer Chamber.

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quibusdam maneriis, terris, et tenementis cum pertinentiis in com. Devon; and of the third part of the manors of Tunstale, and Horton cum Horton, *Hay cum pertinentiis in com. Staff. ac de quibusdam terris et tenementis in parochiis sancti Andreæ Holborn, et Sancti Pancras, in com. Midd.*

And Hil. 6 Jac. the said Earl levied a fine of all the premises *(inter alia)* to the uses in an indenture dated 20 Maii, 7 Jac., mentioned; *viz.* to the use of such lessees to whom the said Earl should let, &c. for and during the estates, term, and interests so granted, and to be granted; and of the reversion thereof, and of all other the premises, to the use of him and his heirs, till by his will in writing, or other writing or writings, at any time or times, subscribed with his own hand, and sealed with his seal, in presence of three witnesses at least, he should devise, limit, or appoint the use or uses of the premises, &c. and then to the use of such person to whom the said Earl should appoint, limit, &c. the same, for such estates, and in such manner as he should so devise, limit, appoint, &c.

7 Jac. he appoints all the lands, "other than the premises in E. and D., to certain uses, which did not take effect.

And that 1 Aug. 17 Jac. by indenture, signed and sealed in the presence of more than three lawful witnesses, &c. and reciting the said fine, with proclamation, and reciting the indenture of 20 Maii, 7 Jac., and his power for expressing and appointing new uses, he declares that the said fine shall be, and the conusees shall stand seised of all the premises [other than of the premises in High Holborn, and the county of Stafford,] to the use of himself for life, &c.: and after his decease, to the use of Sir Edward Bourchier, Lord Fitzwarren, his son and heir apparent, for life; and then to his the said Lord Fitzwarren's first son, and to the heir male of the body of such first son; and so to the seventh son, &c.; and for default of such issue, to the use of the heirs males of the body of the said Earl upon the body of any woman whom he shall hereafter marry; and for default of such issue, then of all (other than of the said premises in High Holborn, and in the county of Stafford aforesaid. And except the manors and lordships of Huntspill, &c. and all

1 Aug. 17 Jac. the settlor, pursuant to the reserved power, appoints other uses of the said lands, except E. and D., *viz.* to the use of himself for life, remainder to the use of Lord Fitzwarren, his son for life, remainder to his son's first son, and to the heirs male of the body of such first son; and so to the seventh son; and for default of such issue to the use of the heirs males of the body of the settlor, on the body of any future wife; and for default of such issue, all the lands except E. and D., A. and C. So to the use of H. B. for life, remainder to the use of the first son of H. B., and the heirs males of the body of such son; and so to the seventh son; and A. and C. to go to the use of trustees and their heirs, till they have raised after the decease of the settlor, and of Lord F. without heir male of their bodies out of the rents, &c. 4000*l.* a-piece for portions for the daughters of L. F.

other the premises in the county of Somerset, and also except the manors and lands in Bampton, Uffculme and Hackpen, in the county of Devon,) to the use of Henry Bourchier for life; and then to the use of his first son, and the heirs males of the body of such son; and in like sort to the seventh son: and of the said manors, &c. and premises so excepted as aforesaid, (other than of the said premises in High Holborn, and in the county of Stafford,) to the use of Francis, Lord Russel and others, the parties to the said indenture, and their heirs, till they have, and lawfully may (after the death of the said Earl, and of Edward without heirs male of their bodies,) raise, receive, perceive, and make out of the rents, revenues, fines, issues, casualties, or profits thereof *4000l.* a-piece for each daughter of Edward lawfully to be begotten. And after the raising, levy, or receipt thereof, then of the said manors and premises so excepted, also (other than of the said premises in High Holborn, and in the county of Stafford aforesaid,) to the use of the said Henry for life; and then to his first son; and so to his seventh in tail *at supra*; and for want of such issue male, then the said fine to be, and the conusees of the said fine to stand seized of all and singular the premises comprised in the said fine, to the use of the heirs female of the body of the said Earl; and for want thereof to the use of the heirs females of the body of the said Lord Fitzwarren; and then to the right heirs of John, late Earl of Bath, his grandfather.

and after the raising thereof, A. and C. to go to the use of H. B. for life, remainder to his first son, and so to his seventh son in tail male; and for want of such issue male, the said lands to go to the use of the heirs female of the body of the settlor remainder to the use of the heirs females of the body of Lord F., remainder to the right heirs of John Lord Bath, his grandfather.

Provided that he the said William Earl of Bath, by deed or deeds, shall or may from time to time appoint so much of the premises (except the said premises in High Holborn, and in the county of Stafford aforesaid,) as he shall think meet, to and for jointure of such woman as he shall marry; and for the jointure of such wife as Edward shall marry; and also to make leases for twenty-one years, or life or lives, of any part of the said manors, &c. and premises before mentioned (except the said premises in High Holborn, and the said county of Stafford, &c.) in possession, reversion, or expectancy, and with or without reservation of any rent; and like power for Edward, after

Power for the settlor to appoint the premises (except E. and D.) in jointure to his own wife, or to the wife of Lord F. And to make leases for 21 years, or life or lives, of the premises, except E. and D. in possession, reversion or expectancy; with like power for D. F. after the death of the settlor, to appoint any of the premises (except as is last before mentioned to be excepted) in jointure, and to grant leases as before of the premises before mentioned, except E. and D.

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the death of William, to limit any of the manors, &c. and premises before mentioned (except as is last before mentioned to be excepted) or so much of the same as he shall think fit, for jointure for such woman as he shall marry, for his life; and to make leases of any part of the said manors, &c. and premises before mentioned (except the said premises in High Holborn and in the county of Stafford aforesaid) to any person or persons, for twenty-one years, or one, two, or three lives in possession, reversion, or expectancy, &c. reserving the old rents rateably and proportionably.

Power for H. B. after the decease of the settlor, and of Ld. F. without such issue male of their bodies as aforesaid, to appoint the premises before mentioned *(except as is before excepted)* in jointure to his own wife or wives, and to make leases of the premises *(except as is last before mentioned to be excepted.)*

And it is further provided, that it likewise shall be lawful for the said Henry, at any time or times, and from time to time, after the death of the said Earl William, and of the said Edward, without such issue male of their several bodies, lawfully to be begotten, as is before mentioned, to assign, limit, or appoint any of the said manors, &c. and premises before mentioned (except as is before excepted) *or so much of the same as he shall think fit, to and for the jointure and jointures of such woman as he shall at any time or times hereafter marry, for terms of the life and lives of such wife or wives.* And that also it shall be lawful for him from time to time, and at all times, after the decease of the said William, Earl of Bath, and Edward, Lord Fitzwarren, his son, without such issue male of their several bodies lawfully to be begotten as aforesaid, by any his deed, &c. to demise, lease, or grant any part or parts of the said manors, &c. and premises before mentioned (except as is last before mentioned to be excepted) to any person, for one, two, or three lives in possession, reversion, or expectancy, wherein the old rent, &c. And that then also, and in every such case, the said fine shall be and enure, and the said conusees, &c. shall stand seised of and for so much of the said premises as shall be so assigned, limited, or appointed by the said Henry in jointure as aforesaid, or shall be by him left, &c. as aforesaid, to and for the use of the said wife and wives of Henry, for term of their natural lives respectively as aforesaid; and also to and for the use and behoof of the said lessee and lessees of the said Henry, during their several terms, &c. and as well of the reversion and reversions of all and singular the premises which shall be so assigned for jointure, or demised, leased, or granted

And then the fines were to enure of the lands so granted by H. B. in jointures and leases; as also of all the other the said premises (except E. and D.) to the uses aforesaid, and to and for no other uses. By this it may seem, these were intended to be totally excepted.

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by the said William, Edward, and Henry, and any of them respectively in manner and form aforesaid; as also of all other the said premises before mentioned (except the said premises in High Holborn, and in the county of Stafford) to the uses, limitations, &c. hereinbefore declared, &c. and to and for no other uses.

A power for the settlor to revoke.

And then there is a power for William Earl of Bath to revoke.

The settlor died. Lord F. his only son and heir entered, and had issue Elizabeth,

Then they find the death of Earl William, and that Edward was his only son and heir; who entered, and had issue the said Elizabeth, wife of the said Earl of Denbigh, Dorothy, and Anne, his daughters; and died without issue male.

wife of the Earl of D., the lessors of the plaintiff, Dorothy and Anne; and he died without issue male.

12,000*l.* raised out of the premises excepted (except E. and D.)

And find that 12,000*l.* was raised, received, and made out of the rents, issues, revenues, and profits of the land in the said indenture excepted (other than the premises in High Holborn, and the said county of Stafford,) after the death of the said Edward by the trustees, and paid to the said three sisters, *viz.* each of them 4000*l.* according to the provision in the indenture.

H. B. married; and after the 12,000*l.* raised and paid by indenture in 1649, he appoints A. and C. to be to the use of his wife in jointure.

And then find that the said Henry (he being then Earl of Bath) married Rachel, the now countess, and afterwards; and also, after the 12,000*l.* raised, received and paid to the said three daughters, that Henry, by indenture dated 30th Jan. 1649, and found *in hæc verba*, reciting the said fine, and deeds of 20° *Maii*, 7 Jac. and of 1° *Aug.* 17 Jac. and that the said portions were raised out of the rents, revenues, fines, casualties, and profits of the premises, and paid, whereby he is become seised, *de*, &c. and hath power to limit any of the premises (except in High Holborn, and the county of Stafford) in jointure. Now, by virtue of and according to his power in consideration of marriage had, and 7000*l.* paid, and great affection to his wife, and for an increase of jointure to her of the lands hereinafter in these presents mentioned, and for other considerations, he declares, limits, and appoints, that the manors of Huntspill, Norton, Fitzwarren, Naunton, and Taunton hundred, fairs, markets, and all other the premises, with the appurtenances in Huntspill, Norton, Fitzwarren, Naunton and Taunton, and in every or any of them in the

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said county of Somerset, and the said manor of Baunton Uffculme, *alias* Uffcolme and Hackpen, and the hundred, fairs, markets, and other the premises, with the appurtenances there in the county of Devon, shall be, and the said fine shall be and enure, and the consignees, &c. shall thereof stand seised to the use of her the said Rachel and her assigns, for her life, for her jointure, and in augmentation of the same, and the better support of her honour and maintenance, and in lieu and bar of her title of dower, &c. with a proviso that leases already made or to be made by Henry, &c. shall be quietly held and enjoyed, according to the tenor, &c. thereof, and then find the death.

H. B. died. The widow of H. B. enters into the third part of A. and C., and was seised thereof till the said Earl of D. and Elizabeth his wife entered, and made the lease to the plaintiff, who entered, and was thereof possessed till the defendant by command of the jointress, ejected him. *Sed utrum*, &c.

And then find the death of Henry without issue, and Rachel yet living, and her entry into the said third part, whereof she was seized, till the said Earl of Denbigh and Elizabeth, his wife, entered upon her, and made the lease to the plaintiff, who entered, and was possessed till the defendant, by the command of the said Rachel, Countess of Bath, entered upon him, and ejected him. *Sed utrum*, &c.

The intention of the party is the guide and rule in deeds as well as in wills: but it must be first manifest, not merely conjectural. Secondly, it must be, not a foreign or collateral intention, but drawn out of the body of the deed itself; and, thirdly, it must not be contrary to the letter; for that were not *interpretari, sed condere.*

It is to be agreed that, as well in deeds as in wills, the intention of the party must be the rule and guide to interpret and expound them: but this intention must be first manifest, not merely conjectural; secondly, it must not be a foreign or collateral intention, but drawn out of the body of the deed itself; and, thirdly, it must not be contrary to the letter; for that were not *interpreturi, sed condere.*

Wills receive so much favour, that *quantum fieri potest*, the law itself is made to bow to the intention of the will, appearing manifestly in the will itself. But if the law be clear and plain on the words of a *deed*, as it is penned, the letter is to be followed.

Wills, because men are supposed to be *in extremis, et inopes consilii* when they make them, then received so much favour, that, *quantum fieri potest*, the law itself is made to bow to the intention of the will appearing manifestly in the will itself. But deeds are supposed to be made in health, and by advice; and, therefore, if the law be clear and plain upon the words as it is penned, the letter is to be followed. The indenture is as the law among the parties; *et a verbis legis non est recedendum.*

Taking these rules along with me, of which I need not give particular instances, for my brethren lay the same grounds, I shall state the case by opening the indenture of 1° Aug. 17

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Jac.; and, indeed, it must take up more time in the opening of it, than in debating of it, there being no arguments to be made upon it, but out of the indenture itself.

The indenture itself having recited the fine by William Earl of Bath, 6 Jac. of these manors and lands in question, in com. Somerset, and of others in Cornwall, and in the county of Stafford, and of divers manors and lands in the county of Devon; and of the manor of Huntscourt, in the county of Gloucester; and of a messuage and four acres in High Holborn, in the parishes of St. Andrews and St. Pancras, in the county of Middlesex; and having also recited the indenture 7 Jac. leading the use of that fine to him and his heirs; and his having power in that indenture, under such limitations, and in such manner, as he should declare, to limit and appoint any new or other powers; according to that power by this indenture, 17 Jac. he first limits several new uses; and then he raiseth several powers by several provisoes; and there are several exceptions, both in the limitations of the uses, and in the provisoes; all which it will be necessary to consider in respect of the reference to them in the words of exceptions in the proviso of power for Henry, whereupon the question now is, which are "except as is before excepted."

First, he limits that "the fine shall be, and the conusees shall stand seized of the manors and premises in the fine (*other than the premises in High Holborn, and in the county of Stafford*"), there is the first exception, "to and for the uses hereafter expressed, *viz.* To the use of the Earl himself for life, and after to the use of Edward Lord Fitzwarren his son for life, and so to his first and other sons and the heirs males of their bodies, remainder in use to the heirs males of the Earl's body; and for default of such issue, then the fine, &c. to be, and the conusees to stand seized of all the said manors and premises (*other than the said premises in High Holborn and in the said county of Stafford aforesaid, and except the manors and lordships of Huntspill, &c. and all other the premises in the county of Somerset,*" being the lands in question, and "*also except the manors and lands of Bampton, Uffculm, and Hackpen, in the county of Devon,*" not now in question,) "to the use of Henry Bouchier afterwards Earl of Bath" (in the right of whose wife the defendant claims) "for his life, and after to the use of his first and other sons and the heirs males of their bodies. And of the said manors and premises so excepted as aforesaid (*other than of the said premises in High Holborn and in the county of Stafford*) to the use of Francis Lord Russel and others" (the parties to the indenture,) "and their heirs till they shall (after the death of the said Earl and

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2d Exception.

3d Exception.

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Edward Lord Fitzwarren without heirs males of their bodies) receive and make out of the rents, fines, &c. or profits thereof 4000*l.* a-piece for each daughter of the said Edward; and after the raising thereof, then of the said manors and premises so excepted also (*other than the said premises in High Holborn and in the county of Stafford aforesaid*) to the use of the said Henry for life, and so to his first and other sons and the heirs males of their bodies; and for default of such issue, then the fine shall be and the conusees shall stand seized of all the said premises comprised or mentioned in the said fine to the use of the heirs females of the body of the said Earl, remainder to the heirs females of the body of the Lords Fitzwarren, &c."

Wrottesley and Adams's case, Com. 195.

So that in these limitations of uses here are four exceptions; some only of *High Holborn and the lands in Staffordshire;* for the words "other than" are words of exception in themselves, and appear to be so understood here; for in the very limitation of the other excepted premises it is here twice repeated as formerly excepted—"and of the said manors so excepted as aforesaid, *other than the premises in High Holborn and in the county of Stafford;*" and it is more manifest by the subsequent exceptions upon the powers, where the very words are, "*except the premises in High Holborn and in the county of Stafford.*" Which observation I make, by the way, to prevent, or rather to answer an objection that was touched on at the bar, and might be made use of to another purpose. That there needed no exception for the lands in High Holborn and Stafford; for admit it were so, yet it appears those were *de facto* excepted, and intended to be excepted in several places in the deed; and therefore the relative words, "except before excepted," must necessarily reach to those lands also; but he that looks into the body of the deed shall find matter to doubt whether there were not uses limited of those lands also after failure of heirs male. My brother Tyrrell put a case wherein he made a difference between "other" and "except;" and therefore put a case, *if A. sell to B. all his land in Dale other than Whiteacre, and all his land in Sale except Blackacre for twenty-one years, and with remainder to D. for twenty-one years, except before excepted,* he holds that Whiteacre passed to D., for that was not verbally excepted. But I utterly deny it.

I come now to the provisoes whereby the powers are created: they have also their several exceptions.

First it is provided, "that the Earl during his life may limit so much of the said manors and premises before mentioned, *except the said premises in High Holborn and in the county of Stafford aforesaid,* as he shall think meet, for a jointure for

such wife as he or his son shall marry respectively;" and also may "lease any part of the said manors and premises before mentioned, *except the said premises in High Holborn and in the said county of Stafford*, to any person, &c. for twenty-one years, or any life, or lives, or years determinable upon any life, or lives, in possession, reversion, expectancy, or by way of remainder, or for any number of years determinable upon one, two, or three lives in possession, reversion, &c., reserving the usual yearly rents, or rateably and proportionably."

Then it is provided, that it likewise "shall be lawful for the said Henry Bouchier at any time or times, and from time to time, after the death of the said Earl, and of the said Lord Fitzwarren, without such issue male of their several bodies begotten as is before mentioned, to limit any of the said manors and premises before mentioned, *(except as is before excepted)* or so much of the same as he shall think fit, for jointure for such wife as he shall marry:"—upon this exception the question ariseth. And also that it "shall be lawful for the said Henry Bouchier from time to time and at all times, after the decease of the said Earl and Lord Fitzwarren without such issue male of their several bodies begotten as aforesaid, to lease any part of the said manors and premises before mentioned *(except before mentioned to be excepted)* to any persons for twenty-one years, or for one, two, or three lives, &c., *verbatim mutatis mutandis* as in the power of leasing to the Lord Fitzwarren.

Upon the former of these two powers given to Henry Bouchier, the question is, whether those words "except as is before excepted" do except out of Earl Henry's power to make a jointure of the Somersetshire lands now in question, and the three manors in Devonshire, which were formerly excepted in the limitations to him, and limited to the Lord Russel and others and their heirs, till 4000*l.* a-piece were paid them for each daughter of Edward; and after those sums raised, then also limited to him, and not before. I am of opinion that the Somersetshire lands and the three manors in Devonshire, limited for the raising of portions for the daughters of Earl Edward, are wholly excepted out of the powers of Earl Henry to limit the same as jointure; and consequently that judgment ought to be given for the plaintiff.

There have been two constructions made at the bar of these words in Earl Henry's power, "except as is before excepted," by those who have argued for the defendant.

The first is that the words "except as is before excepted" shall extend only to except the lands in High Holborn and in the county of Stafford, and not at all to except the Somerset-

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shire or other lands. First, for that all the other exceptions in the powers are only of the lands in High Holborn and Staffordshire; and it is reasonable this should have the same construction, being amongst them. And, secondly, that it is reasonable to construe the words with reference *ad ultimum antecedens* (the powers given to Edward); the rather also because, thirdly, the proviso is coupled by the word "likewise" to the former, "provided that it *likewise* shall be lawful for Henry, &c."

To which I answer, first, that the words "except before excepted," and "except as is before excepted," taken according to the letter, relate to all that is before excepted *in eodem genere*, all that relates to the same hand. If the words had been expressly "excepted all before excepted," it had been "excepted all that was before excepted in the limitations;" and it is tantamount, for *indefinitum æque pollet universali.* Secondly, the different penning of the several exceptions in the powers argues the intent and meaning of them to be several. Upon that learning divers cases may be put, as Carter and Ringstead's case, 8 Co. 235.; Ewer and Heydon's case, Cro. Eliz. 476.; and divers others.

The powers to Earl Wiliam and Lord Fitzwarren have the exception either expressly, "except the premises in High Holborn and Staffordshire," or, where it is immediately before expressly excepted, they have the exception with reference, "except as is last beforementioned to be excepted;" and so it is bound up to Holborn and Staffordshire by that reference. But in the powers to Earl Henry the power for jointure is "except as is before excepted," not "except as is last before mentioned to be excepted;" and so is left loose, and not restrained. But "*ante*" reacheth to all that is excepted as to and concerning the same person. Now the word *præ*, where it is not restrained, reacheth to all before it, as *præconcessa*, *prærecitata*, *præmentionata*, and the like; and so *præ-excepta.* And the argument of reference *ad ultimum antecedens* is but *petitio principii;* for I deny that the exception in the power to Edward Lord Fitzwarren was the antecedent to which this exception in Earl Henry's powers relates: but the exception in the limitation of use to Earl Henry himself, that was the antecedent to which it refers. And for the word "*likewise,*" which was insisted on at the bar, it is a coupling word as to the power, that he shall have powers as the other had powers; but extends not to the qualifications of those powers, which are to be fetched out of the powers themselves. As it is in fines where there are several conusors, after the first there is "*et præterea,*" "*et ul-*

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terius," " *et etiam*," " *et insuper*," &c. and so several variations of the phrases by the clerks; so it is here, and in other conveyances, there being several provisoes for powers. There is, first, a proviso for Earl William for jointure; then it begins with " *moreover*" for his leases; then proceeds to " *and further*" for the Lord Fitzwarren's powers for jointure, and " that also" for his leases; and then it follows, " and that *likewise* it shall be lawful for Henry to make a jointure," so that there is no more to be inferred from the variation of these phrases in the coupling words, but that they demonstrate the clerkship of the clerk who drew them, and signify the same thing in different expressions.

Tr. 10 C. B. R. Cr. Car. 369.

In Spert and Bence's case there was a devise by Thomas Cann of some lands to Thomas his son in tail, and of other lands to Francis in tail; then there was a devise of others to Henry in fee.—" *Item*, I give to my said son Henry my house and lands in Wickware. *Item*, I will that all bargains which I have from Nicholas Webb, my son Henry shall enjoy, and his heirs for ever; and for lack of heirs of his body to remain to Francis for ever." It was strongly urged that Henry had an estate of inheritance in Wickware; for he devised in the clauses to the other sons, and also to Henry himself, estates of inheritance in other lands; and by intendment his affection was equal. And, 2dly, the *item* couples them together, that he should have as great estate in quantity as the others. But it was adjudged by all the judges, both in C. B. and after in B. R. First, that Henry had but an estate for life in the house and land in Wickware, though it was in the midst of devises of greater estates: secondly, that the *item* shall not extend to the quantity of the estate, but to the clause following that he deviseth, &c.—which interpretation, being in the case of a will is much stronger than our case, and answers both the objections; both that from the word " *likewise*," and also the other objection from the expounding the proviso by the other provisoes to which it is subjoined.

But I shall not need to labour much to prove that the exception in the power to Earl Henry extends to the Somersetshire, and other the portionary lands; for, secondly, this construction, that the lands are not at all excepted out of the powers to Earl Henry, would wholly cross the purport of the deed; for if the Somersetshire lands were, by construction, wholly out of this exception, then Henry had power to make a jointure to his wife of these lands before the 4,000*l.* a-piece raised. And by the other power which Henry had of making leases (which is penned in the same manner, and refers to this power of making a jointure,) by the words " except as is last

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before mentioned to be excepted," he would have power to make leases for three lives or years, determinable upon lives in possession, reversion, expectancy, or remainder of these portionary lands; and so *non constat* whether the 12,000*l.* would ever be raised time enough for marriage portions or not; for upon the jointure no rent would be reserved, and perhaps the leases might be made for three lives, or years determinable upon three lives, to begin after the jointress's death; however, after leases then *in esse*, or to be made at any time during his life: during which time the portions by this construction could not be raised.

The estate is raised by virtue of the power; and, therefore, it hath its essence out of the estate which passed by the fine levied by William, Earl of Bath; and, as it is said in Whitlock's case, in construction of law, the lease or jointure would precede all the particular estates, and be taken as if the use had been originally limited to the jointress, or such lessee, and after to Earl William for life, remainder to Edward, remainder to Henry, &c.

8 Co. 71.

For that cause, in Fox and Brickwood's case, J. S., having made a lease for life, levies a fine to the use of B. for fifteen years; and afterwards to the use of himself for life; with a power for him to make leases for three lives, or twenty-one years in possession; when the lessee for life dies, by virtue of this power J. S., the conusor, may make leases, notwithstanding the precedent limitation for fifteen years to B., which leases, in construction of law, shall precede the estate to B. And this is a good power, though J. S. had not the present possession, but B. had it by the estate for fifteen years.(*b*) So here, though the estate be not limited to Earl Henry, till after the determination of the estate to the Lord Russell and others, by the raising of the 4,000*l.* a-year for the daughters; yet the power being to take effect at any time or times, and from time to time after the death of the said Earl William, and the Lord Fitzwarren, without issue male, if the Somersetshire lands be wholly out of the exception, Earl Henry, after their deaths without issue male, might make use of this power, either for jointure, or lease during that estate, limited to the Lord Russell and others for raising the portions.

2 Cr. 349, 18 Jac. B. R.

This was so unreasonable a construction, and so clearly contrary to the intention of the parties, that the defendant's counsel resorted to another construction of the words. And my

(*b*) This statement of Fox and Brickwood, seems *not* to confirm the opinion of Mr. Sugden, in his Treatise on Powers, p. 585. 3d ed. who there controverts the conclusion which Mr. Powell (on Powers, 486. 2d ed.) had drawn from the same case.

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brethren, who have since argued for the defendant, have waived this construction. My brother Tyrrell indeed urged, that the exception was uncertain and void, because it appears not to which of the exceptions the clause "*as is before excepted*," in Earl Henry's power, related. But then we fall into the ill consequences of the other construction; for then Earl Henry might make jointures or leases, after the death of Earl William and Edward without issue, of the portionary lands, before the 12,000*l.* raised. But, 2dly, the exception is not uncertain, neither in the opinion of those who argued for the defendant, who say it refers to the last exception in Edward's powers, and no further, and so only excepts Holborn and Staffordshire; nor, in our opinion, who are for the plaintiff, and say it refers to the exception in the limitation of the Earl to Earl Henry.

But now the second construction, made on the behalf of the defendants, of the words "*except as is before excepted*" was this;—except the Somersetshire lands, and other the lands appointed for portions as they are before excepted;—that is, whilst the estate is to be in the Lord Russell, and other the trustees for raising portions, they shall be excepted; but when those portions are raised, then the estate, being in Earl Henry, he shall have those powers of making a jointure or leases of them also. In the first limitations to Earl Henry, these portionary lands were first excepted from him, and after that the estate limited to Lord Russell and others for portions, was determined, the same lands were limited to him for like estate as he had in the rest; and it is urged, that as the exception was in the limitations, so it is reasonable to construe it in these powers; and as all the other powers went along with the estate, over all but High Holborn and Staffordshire, so it is reasonable this should go with the estate, that when Earl Henry had the estate in these lands, he should have the same powers over these lands as he had over other lands, when the estate thereof fell to him.

This seems *prima facie* to be a very reasonable interpretation in itself; and it hath been enforced that the words are not "*except before excepted*," but "except *as is* before excepted." The words "*pro ut*" or "*ut*" may denote not only the thing excepted, but the manner how it is excepted. Those lands were excepted from Earl Henry in the limitations of uses till the portions raised, but not afterwards; and so, though the words "*except as is before excepted*" in this exception in the clause of Earl Henry's powers shall go also to the lands in High Holborn and Staffordshire; yet they may be taken thus,—except all the promises before excepted, as they are before

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8 Co. 91. Frances' case, —*prædicti usus.*

excepted; *viz.* Holborn and Staffordshire *absolutely*, and Somersetshire, and other the portionary lands, during the time that the Lord Russell and other trustees have them, and no longer. And many cases may be put where the words shall be taken *reddendo singula singulis*, and the word *respectively* be supplied in law; and some cases where the word "as" may be construed to extend not only to the thing excepted, but to the qualifications of it also.

This construction hath been enforced very strongly, I must confess, by my brethren who argued against me: but both of them, if I mistake not, went further; and insisted upon that which was but touched at the bar, that Earl Henry, after the deaths of William and Edward, without issue male, and before the 12,000*l.* raised, whilst the estate was in the trustees, might make present appointment to his lady for jointure, which appointment should take effect after the raising of the 12,000*l.*

The truth is, I think it necessary for them to make this construction; for the words of the power being, "that it shall be lawful for Earl Henry, at any time or times, and from time to time after the death of Earl William and Edward Lord Fitzwarren, without issue male, to limit any of the premises, *(except as is before excepted)* in jointure," if this power was not exerciseable till the 12,000*l.* was raised, then, against the words of the power, Earl Henry could not, *at any time or times, and from time to time after their death without issue male*, limit in jointure any of these lands; for till the portion raised, the estate in law, after Earl William and Lord Fitzwarren's death, was in the trustees, who were not to begin to raise the portions till after their deaths without issue male; and by necessary consequence the words of the power must extend only to such lands as *might* be limited by Earl Henry *at any time, and from time to time after the death of Earl William and his son without issue*, which these lands, upon any other construction, cannot.

I shall, therefore, in the first place, endeavour to prove, that Earl Henry had not any power, nor was it intended that he should have power to limit the Somersetshire lands in jointure, whilst the estate was in the trustees, and till the 12,000*l.* raised; and in the next place shew that the other construction of the words "*except as is before excepted,*" that the exception is not absolute but partial law—that after the portions raised, he might exercise this power, ought not to be made.

Wherein, first, I shall not need to labour to prove that the whole fee simple is limited to the Lord Russell and other trustees, till the portions raised; for, though my brother who first argued, seemed to incline that it was a chattel, yet neither

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of my brethren agreed to it; and it is clear that it is a fee simple. The difference is between a limitation of use to a man till 12,000*l.* raised; that, perhaps, in a use (for it is not so clear as in a devise) may be a chattel. But if it be limited to the use of a man and his heirs, till 12,000*l.* raised, it is a limited fee simple; and whatsoever estates are limited over are but contingent. The word heirs being in the one case, and not in the other, makes the difference.

In the next place, I do conceive, under favour, that these two constructions which my brethren, who argued for the defendant, have made of the words, *except as is before excepted*, are one contrary to the other; for if the words "*except as is before excepted*" must be thus construed, that they shall extend not only to the lands excepted, but also to the qualification of the exception, as they laboured to enforce it upon the "as," and the "*sicut*;" and that as the use was limited to Earl Henry, after the portions raised, and not before; so the power was exerciseable when the estate came to him,—then it was not exerciseable before the estate came to him;—and then this last conception, that Earl Henry might make an appointment of a jointure after the death of the others without issue male, before the estate came to him, cannot hold. It is, I conceive, apparent they do so interfere, that the one of these constructions falls to the ground; for the one of them makes the estates and the power necessarily go together; the other makes the power exerciseable before Earl Henry have the estate. But both interpretations being objected to, and both making against my conclusion, I shall endeavour to give answers to both.

First, then, I hold that Earl Henry had no power to limit any of these portionary lands in jointure whilst the estate was in the other trustees, and not in him.

I found the first reason upon the words which my brethren in their argument enforced, the coupling of this power to the others with words of connection as, "and it is further provided, that it shall be likewise lawful," &c. All the other powers are powers annexed to an estate, and exerciseable only whilst they have the estate; and by the same reason this ought also to be so, and not to be a power in gross. This is *argumentum ad homines*.

This very power to Earl Henry to make a jointure, as to the rest of the lands, (which I shall shew anon are more considerable than my brother Archer would have them,) is a power annexed to the estate and use limited to him, and not in gross. What rule or measure is there that the same words in the very same clause should be a power annexed to the estate as to the rent, and be a power in gross as to these lands, there being no

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6 Co. 33. Fitzwilliam's case.

variation of the phrase? Out of what words in the deed can this intention of a present appointment of a future estate appear?

If it appears by the power itself that it is for limitation of a jointure,—is an estate limited to commence, no man knows when, after 12,000*l*.. raised by one who hath a contingent use, which may also be disturbed before it happen, a jointure? Aye, said one of my brethren, it is a good jointure, though not to bar dower, or within 27 H. 8., yet within the statute of 11 H. 7.

I might reply, that the intention of the parties for a jointure was such as to bar dower, that the wife might not have any dower of the rest of the estate; and it was so understood by Earl Henry, and his counsel here, for this jointure is expressly limited *in bar and lieu of dower.*

But it is apparent that the intention of the power for a jointure was to make a sufficient present provision of livelihood for persons of their qualities, and not to feed them with expectations and contingencies. I go a little further: I am not satisfied to be of the opinion, that if Earl William had limited a jointure of part of the lands according to his power, and Edward had limited another jointure of other part according to his power, that Earl Henry, during these jointures, in fine, could have limited the same in jointure again during the continuance of these respective jointures; no, not of those lands limited to him by the first limitation immediately after the death of Earl William and Edward without issue male. For these successive powers ought to have reasonable constructions; as in Leper and Wroth's case, a power to make leases for twenty-one years generally: yet he cannot make a lease for twenty-one years in reversion, or to begin *in futuro;* but it must have a reasonable intendment. And if such a power be not exerciseable to a future estate *when* he hath a present estate, much less *before* he hath a present estate.

It is agreed by my brethren, that Earl Henry's power for leasing is as large as that of making a jointure, and extends to the same lands. By this construction, Earl Henry might limit these lands by way of lease to commence after the 12,000*l.* raised. Nay, the very words of the power are, *to demise them in possession, reversion, or remainder.* If this could be,—how could the trustees raise the 12,000*l.*? Nay, if it could be so, this estate raised by virtue of the power, as I shall shew anon more at large, must and will precede the estate of the trustees themselves. And herein the words in the declaratory clauses are very observable, "that the conusees shall stand seized of the premises so limited for jointure, or lease, to the use of such

wife for her life, and of such lessees during their terms, and after of the reversion thereof, to the uses before declared." So that the lease by Earl Henry would by this construction interpose before the estate of the trustees, which was limited by way of use.

Lastly, this construction of a present appointment by Earl Henry of a future interest seems to be different from the opinion of Earl Henry himself, and his counsel, who in framing this jointure to Countess Rachel say, "that the 12,000*l.* being paid, he is now seised, and hath power to limit in jointure," applying the power to his seisin.

I have been the larger in speaking to this conception that Earl Henry had a present power before the estate fell to him, for that I do much rely on the sense of these words in the power of Earl Henry, "at any time or times, and from time to time after the death of Earl William, and Edward, without issue male, to limit a jointure," &c. which, by this opinion of Earl Henry's present power, though not to take effect till after the 12,000*l.* raised, is endeavoured to be evaded by saying he had a power exerciseable by way of appointment from and immediately after their deaths without issue, though not to take effect till the estate of the trustees ceased.

I now come to the other interpretation of the words, "except as is before excepted," which is that, *viz.* except Holborn and Staffordshire lands *absolutely* out of the *power*, (*c*) and the Somersetshire and other portionary lands only during the time that the trustees have them for raising the 12,000*l.*: but when that is raised, and the estate in Earl Henry, then those lands also to be in the power—not excepted.

I conceive this cannot be the literal or proper interpretation of the words, "except as is before excepted," to except those lands out of Earl Henry's power only with a *quousque*; and yet I shall agree that an interpretation or construction ought not to be against the letter.

Construction ought not to be against the letter of a deed; yet in some cases a strained and secondary interpretation may be admitted to avoid absurdity, where the plain intention of the parties in the other parts of the deed is to have it so; otherwise, where the intention of the party is not clear, but in *equilibrio* as it were.

I agree, though an interpretation or construction ought not to be against the letter of a deed, yet in some cases a strained and secondary interpretation may be admitted *ut evitetur absurdum*, when the intention of the parties, by comparing it with other parts of the deed, is plain and manifest to have it so. But where the intention of the party is not clear and plain, but is in *æquilibrio* as it were, in such case I shall not make a strained or secondary exposition, or construction, but

(*c*) "*Power*" supplied by Mr. Hargrave with reference to Carter 108.

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expound them after the more proper and natural construction of the words.

In the natural and grammatical construction of the words, "except *as is* before excepted," I conceive they are no more but *except before excepted.* It has but a single aspect to the things excepted, and not to the *manner* of the exception; for, then, in a true and grammatical construction, the word excepted should be twice repeated; thus, *except all the premises before excepted in manner as they are excepted;* for it must by that construction have a double reference, both to the things excepted, and to the manner of excepting it. It cannot be denied but that this exception hath relation to the thing excepted. I conceive it is not sufficiently expressed to relate to the *manner* of excepting it.

Much hath been insisted upon the words *as* and *sicut*, and that the *sicut* must have a *sic.* And it hath been also insisted upon that the words are in the singular number, as *is* before excepted, and not as *are* before excepted. I crave pardon if I do not understand the force of the argument from the word being *is*, and not *are* excepted; for if it were *are* or *is*, the word in Latin is in the *impersonality*, except *pro ut præexcipitur*, which takes in all the exceptions. But if you take it in the singular, as my brother would have it, it makes more for me; for there was but one single exception in the limitation of use to Earl Henry, and therefore it more strongly enforces (if it have any force) a reference to this; for the *sicut*, I conceive that is not the proper Latin word in this place, for in our law we have commonally *pro ut excipitur*, and not *sicut excipitur.*

But I must observe, since we are upon criticisms, that the words are not, "excepted as *it is* before excepted," but "excepted as *is* before excepted." They make some difference in the English, but more in the Latin, by which we may the better explain them, as *but* hath been expounded by *sed*, or *cum*, and exposition made accordingly. In the Latin, "as *it is* before excepted," rendering it literally, it is "*exceptis pro ut excipitur*," or "*præ antea excipitur;*" but "as *is* before excepted," is "*exceptis præexceptis*," or "*exceptis quæ præexcipiuntur*," or "*præ antea excipitur*," or, in the singular number, "*excepto quod præexcipitur.*" *Ut*, both in grammatical and legal construction, may import identity, as *descendit ut filio et hæredi, et fuit seisitus ut de libero tenemento*, that is, he was *filius et hæres*, he was seised *de libero tenemento:* but *prout* may signify sometimes *secundum quod*, and relate to the manner of exception more properly than the thing excepted. But in truth our English *as* signifies *quod*, or that, as frequently as *ut*; I will

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do as I may; I will do as becometh me, that is what I may, or that which I may, or that which becometh me.

But it is plain that, in common acceptation, "except as is before excepted," and "except before excepted," are synonymous, and signify the same things without any criticisms; and so it is in this very *case. (d)* In the powers to the Lord Fitzwarren for jointure, there is, "except as is last beforementioned to be excepted;" that is, the lands in High Holborn and the county of Stafford, which had before a total and no qualified exception; and in the next power to him for leases, "except the premises in High Holborn and the county of Stafford," which is *idem per idem;* and yet there the *as* is added in the first of the powers, and not in the second; nay, in the very powers to Earl Henry, now under consideration, though the power for jointure is, "except as is before excepted," yet in the power to him for leases, which immediately follows, it is, "except as is last beforementioned to be excepted;" the very same words that are in the exception in the power of jointure to the Lord Fitzwarren. And there the word *as*, agreeing with the word *last beforementioned*, seem rather to refer to the thing excepted than the manner of excepting it; and the sense of them, except last beforementioned to be excepted, and except as is last beforementioned to be excepted, are all one.

These may seem to be too grammatical and critical observations, *et sæpe numero ubi verborum proprietas attenditur rerum sensus amittitur:* but the use I make of them is, first, to take off the force of the objections from the word *as;* secondly, to shew that the most proper and vulgar signification of the words "except before excepted," and of the words "except as is before excepted," is the same. Though I deny not, as I said before, that in some cases the intention expressed in the deed appearing clear to that purpose, the secondary sense, *viz.* that except as is before excepted may take in as well the qualification and manner of excepting as the thing excepted, but not generally and universally, nor where the intention appears not manifestly. And therefore I shall follow the method taken by my brethren to search into the intention of Earl William appearing in the deed, and examine whether the intention of Earl William, appearing in the deed, inclines more to except those Somersetshire and portionary lands out of the power of Earl Henry for jointure, or lease, or to include them within his powers; for the intention of it manifestly appearing may guide us either to the first and more proper, or to the second

(*d*) Query "*case*" omitted in the manuscript.

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and less proper, exposition. The plaintiff's lessor claiming as heir to Earl William, it would serve my turn if the intendment stood indifferent, and that it did not appear more one way than the other, whether Earl William intended that Earl Henry Bouchier should have power to make a jointure, or to make leases of the lands in Somersetshire, and other the portionary lands, or not. But yet I conceive his intention, so far as it may be collected out of the deed which is our guide in this case, is much more strong than Earl Henry should have no such power than otherwise.

For, first, it appears that Earl Henry had no greater estate than for life limited to him in these portionary lands, and that estate for life was not to commence as to these lands till after the portions for Earl Edward's daughters paid. These portions might have been more than 12,000*l.* if there had been more than three daughters: but they came to 12,000*l.* The jointure out of these lands could not be limited till that 12,000*l.* raised; the raising of this 12,000*l.* was not to begin till after the death of the Earl William and Lord Fitzwarren without issue male; and that Earl Henry was in possession; and this 12,000*l.* is not an inconsiderable sum to be raised, especially without sale, which the trustees had no power to make. Can any man think that Earl William did expect or intend that Earl Henry (being the only male, and only person of the stock to whom the earldom should descend, as may be inferred by the limiting the remainder over to the heirs females) should be enforced, after the earldom fell to him, to continue unmarried, or without making a jointure, till this 12,000*l.* was raised by the trustees? Earl Henry (upon the death of the others without heirs male) by the deed had a present power to make a jointure of all the rest of the estate, which appears to be very considerable. If he had made those in jointure, I will not now deliver my opinion upon the point of law, whether he could make an addition or supplement to that jointure out of those lands if the power reached to them, because it may come in question hereafter, and there hath been no cause to take it into consideration. But I will say this, that nothing appears in the deed, that Earl William intended to give any power to make an additional or supplemental jointure to the same wife that had a jointure before out of the same estate, or to make her two jointures.

Secondly, it appears that the powers which Earl William intended to Earl Henry to make jointure or leases were to take commencement at the death of Earl William and his son, without issue male. The words are express, "that it shall be lawful for Henry at any time or times, and from time to time

after the death of Earl William and Edward without issue male," to make a jointure, and to make leases. If "from time to time," then immediately after Edward's death without issue, and at any time during Earl Henry's life before portions raised, the words may be fully and literally supplied out of the rest of the estate, but cannot out of these portionary lands; for he cannot at any time or times after their deaths without issue male, and after the portions paid, and not at any time or times, and from time to time after their deaths without issue male.

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And I observe, that to make that interpretation, that the power should be construed respectively to reach to the rest presently, and the portionary lands after the 12,000*l.* levied, it must have the aid or supply of a double addition. First, the words "from time to time after the deaths of Earl William and his son without issue male" must in construction have an addition of the words, *or after the raising of the* 12,000*l. respectively*. Secondly, to the words "except as is before excepted" there must be another addition of these words, *respectively as the same are hereinbefore excepted.*

And I do observe that the other lands were not subject to the 12,000*l.*; and as to them all these powers for jointure are as it were annexed to estates *in esse*. The Lord Fitzwarren had an estate *in esse*, though in remainder; so had Earl Henry: but of these portionary lands the fee simple was in Lord Russell and others; and there was but a possibility of an use in Earl Henry. And therefore I think in such case to give a power to make a jointure, or leases of such lands, whereof he had but a contingent future use, and the use was limited to others in fee, it requires especial and proper words. At least, the intention of Earl William to have it so ought plainly and manifestly to appear in the indenture itself.

I have not yet heard any other but conjectural arguments at most, that the intention of the deed was so; and when words are express and plain as here they are, and may have their effect as here they have, on the rest of the estate, (which by the name and number of the manors and lands seems to be far the greatest,) in such case, without a clear manifestation of the intention to that purpose; to make up the construction of this clause of the power of Earl Henry with such additions as these, seems to me not to interpret the power, but to make new ones.

Where words may have their full effect by one construction, and for another conjectural arguments only are adduced, the former will be preferred.

But to prove the intention of Earl William to give power to Earl Henry over all, it was urged that it were a strange thing if Earl Henry, having such an estate, being a West country estate consisting in old rents, &c. should not have power to lease it. I allow that if he hath power to make a

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lease, he hath power to make a jointure; and therefore the argument from the one power to the other being both, as to this purpose, penned alike, is good. But the answer is plain:—if he do make it in jointure, as it is alleged here he hath done, then it may be a question, whether he can execute the power for leasing also, after he had executed the other power for jointure. But if he might, yet since his death the mischief is the same; for the jointress can make none of those West country leases, but only determinable on her own life; and so might Earl Henry, after the 12,000*l.* raised, make leases determinable upon his life.

Secondly, it was said, Earl William intended to preserve the honour which descended to Earl Henry, and to prefer him before his daughters; and therefore it was reasonable he should have as large powers as Edward Lord Fitzwarren had.

To this I answer, the case is not the same; for though Edward Lord Fitzwarren had a power to make those portionary lands in jointure, yet it was but a power; he might settle only part in jointure, and he was a son, and might very well be trusted between his wife and his sons and daughters—a mother and her children. But the case is not so with Earl Henry: he was a far remote cousin to the children of the Lord Fitzwarren, who were in the sixth or seventh degree from him, he being but a cousin-german to their grandfather, as appears in the deed; and therefore it was more than probable; and the event proves it, that he would execute his power to the utmost for a wife, or in making leases, rather than preserve it for them in remainder, who were in so remote a distance. My brother Browne made a good *quære*, whether it could be prudentially imagined that Earl William, if he were asked the question, whether if Earl Henry, his collateral kinsman, died without issue male, his lady, who was a stranger to Earl William, should go away with these lands in question, having in effect the rest of the whole earldom from his own grandchildren for her life, he would answer it affirmatively. No, certainly, when it is to be considered, that there was a fair estate besides left to make a jointure, and that this could not take effect till his grandchildren's portions raised; and so uncertain, and not fit for a jointure; and that this very estate is limited by him for want of Earl Henry's issue male to those grandchildren; and that if this were only limited in jointure, Earl Henry's own issue male, who would have been Earl, must have depended for all his maintenance upon this jointress.

It was said that these lands were the seat of the family: but

that doth not appear in the record. But if so, it is the stronger argument that Earl Henry William intended them for the heir male, and so excepted out of Earl Henry's power to limit them in jointure.

And whereas it is said that the rest of the estate was not considerable, that is *gratis dictum;* for it appears to be very considerable, by the many names and number of acres mentioned in the fine, as all the lands in Cornwall, Gloucestershire, and many manors in Devonshire, &c.

Here mention all the rest of the lands found in the verdict, subject to the power of making a jointure.

But this objection needs no answer: it rises no higher than to a bare conjecture at most of Earl William's thoughts. And we are not to judge of them further than they are legible in the deed.

Another reason which moves me against this construction of the words, "except as is before excepted," that they should be taken to except only the portionary lands till the 12,000*l.* for the portions raised, and no longer, is this:—By the indenture the 12,000*l.* is to be raised out of the rents, issues, fines, casualties, or profits of these lands; and it is not to be raised by sale. And it appears by the power reserved for making leases, that this estate consists much of old rents; and so it was agreed by the defendant's counsel, who made this objection upon it. And it appears by the jointure deed made to the Countess Rachel by Earl Henry, found in this verdict, that the 12,000*l.* was raised, as well out of the fines and casualties as the rents and revenues. The fines which should raise the 12,000*l.* by reasonable intendment must be fines for leases, and it is reasonably to be presumed that the 12,000*l.* which is found to be raised was raised by leases made by the trustees, and that Earl William intended they might make such leases, if such leases were made by the Lord Russell, and other the trustees, if afterwards Earl Henry might limit these lands in jointure, this jointure must take place and precede the leases, and avoid them during the jointure; for the leases made by the Lord Russell and other trustees are made not by virtue of a power, but out of the estate limited to them and their lessees come under them; but the jointress claims under Earl William by the fine. And in construction of law it is as if the jointure were originally limited to her upon the fine, as appears by the cases cited before.

If it be said that the power shall be understood so as that her jointure shall take effect charged with the estates made by the trustees, I say that were to make a farther addition, or supply to the words of the power, *viz.* to add these words, *this power to be subject to the leases made by the trustees;* and

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Where powers are to take effect subsequently, and to stand charged with estates made by those who claim under the uses in the conveyance, there ought to be express words for it; otherwise it is contrary to the nature of the power, which is understood to have its essence from him who created it, and in construction of law to precede the limitation of uses.

so by admitting three such additions, as in this exposition you do, there may be made *quidlibet ex quolibet.*

But, secondly, I answer that in such cases, where powers are to be put in execution to take effect subsequently, and to stand charged with estates made by those who claim under the limitations of the uses in the conveyance, there ought to be express words for it, and so hath been in all conveyances that I ever saw; for otherwise it is contrary to the nature of the power, which is understood to have its essence from him who created it, and in construction of law to precede the limitations of uses.

And this is proved by Whitlock's case, and Fox and Brickwood's case, which I cited before.

So that, (*e*) as the defendants would construe the words of the power, Earl Henry might limit these portionary lands in jointure, or make leases of them as soon as Earl William or his son died without issue male; and then in all probability there being a jointure, and possessionary and reversionary leases intervening, the portions could not be raised in any convenient time to marry the daughters. Or if leases were made by the Lord Russell and the other trustees, (*e*) and so the portions raised, then Earl Henry, and so his Countess here, coming in paramount, might avoid these leases.

For it much differs from the case 12 Eliz. 290., and Dutton and Ingram's case, 2 Cr. 427.; where the case in effect was,—a man devised lands to his son John, and the heirs of his body, upon condition that he should grant a rent of 4*l.* to Stephen, his second son, and his heirs, which grant was made accordingly. It was resolved, that by the limitation of the will, John is to make the grant of this rent, which, being by the appointment of the donor, stands with the gift, and shall bind the issue in tail. Secondly, That this rent in fee simple shall continue, though the estate of John be determined; for it was a good grant of the rent in fee, issuing out of all the estates, and not out of the estate tail only; and, being guided by the directions of the will, it shall take *effect* (*f*) according to the limitation thereof, and charge all the inheritance.

The case, 12Eliz. 290., which is also 2 Cr. 57. is,—A recovery was suffered in London to the use of the reversioners till they have made a lease by indenture for forty years, and after to the use of the baron and feme, and the heirs of the feme, it being her land, the wife cannot avoid this lease.

(*e*) The paragraphs from this passage to p. 178, "fines made in granting estates," seem to be omitted in Carter's report of the case.

(*f*) The word "effect" is here supplied.

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In those cases the grant of the rent and the lease for years were raised by a common law estate, and not by virtue of a power; and by the express words as well as by the intent of the deed, were to take effect from the time of the making; and the estate of the freehold and reversion were to be clogged with them. But the estates raised here by Henry Earl of Bath by virtue of the power were in law to precede the estate limited to Henry himself, as if they had been precedaneously limited by Henry himself; and also, by the express words of the deed, the powers were to take place from the death of Edward without issue.

The force of this objection one of my brethren of the contrary opinion would avoid, by denying that the Lord Russell and other the trustees had any power to make leases; and affirming that the clause whereby they are to raise the portions for daughters out of the rents, fines, issues, casualties, and profits of the lands, is to be expounded, not of fines by making leases, but of fines of copyholds, or fines in courts.

But this construction, I take it, is contrary to the bent of the former argument, wherein it was insisted upon that the manors consisted most of old rents. It must be a very great yearly present revenue which would raise timely portions of 4000*l.* a-piece to the three daughters, in all 12,000*l.*; and if there had been many more daughters, (as then there might) 4000*l.* more to every other daughter; which old rents will not well pay unless by fines upon leases.

Unless the contrary appear, it shall be presumed that all lands are of the natureofand disposeable according to the common law.

The word *fines* cannot reasonably be taken for fines of copyholds; for, first, it doth not appear, neither for aught I have heard are there any such copyholds; and, unless the contrary appear, it should be presumed that all lands are of the nature of and disposeable according to the common law. Secondly, The great care which is taken to limit a power to Earls William, Edward, and Henry, being tenants for life, to make leases, argues that the land was leasehold, not copyhold; for there needed no reservation of power upon copyholds, *dominus pro tempore* might grant them according to custom.

There needs no reservation of power to lease upon copyholds; the lord may grant them according to the customs. (g)

And the word *fines* cannot be taken for fines in courts in nature of *amerciament;* for such fines are to be imposed only in courts of record, and for offences. These are only courts of manors, and which have no such power. If there were any other courts of record they should have been found in the verdict, which finds the seisin of Earl William. Besides, such kind of fines make little towards raising such portions as these. And the subject matter being the raising portions out of estates

(g) See 4 Taunt. 294. Sugden on Powers 155.

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by fines, it is a violence offered to the words to construe them otherwise than according to common and vulgar speech and intendment, *viz.* to raise them by fines made in granting estates.

And, lastly, if the intendment of the deed were totally dubious, as to me it seems otherwise, then I ought to construe it in favour to the heirs of Earl William, who made the settlement, and to whom the same is limited in remainder; and gives these lands to them, rather than to give the whole estate to a jointress, who is a stranger to the estate and family of Earl William; and who is, or might by the power, be provided for sufficiently out of the rest of the estate.

I shall in the next place give an answer to some objections which have been made, and not yet answered. One main objection was made by my brethren who argued for the defendant to this effect: that it is frequent to have a transposition of words to make all parts of a deed to agree, when otherwise there may seem a repugnancy; and, therefore, if the words of the limitation of uses had been, *and for default of issue male of Edward, then of all the premises, other than or except*, (for under my brother's pardon, who made a difference, *other than* is only a perfect word of exception,) *the Somersetshire lands, to the use of the trustees and their heirs* quousque *the* 12,000*l. raised; and after, of those Somersetshire lands, as also of the rest after the death of Edward without issue male, to Henry for life, and so to his first son, &c.:* it was said this would have made all clear, that the intention of the exception was only till the portions raised. And as it is, it ought to be so construed, it being but a transposition suitable to the words in the other limitation of the Somersetshire lands; the varying it and dividing the sentence being, as was said, only to avoid confusion in the deed.

Wrottesley and Adam's case, Com.

To this I answer, first, that if the words had been so penned, it had been no exception properly, but a postponing of the Somersetshire lands in the limitation to Earl Henry.

But if you make a case wherein you shall insert words of exception, as, *except the Somersetshire lands till the* 12,000*l. portions raised*, in the words of limitations of the estate which will be distinct, I will not determine how, in such a case, the words in the proviso of power for Earl Henry may extend; for still there is an unsuitableness of it to the estate of Earl Henry, the power being by the lessor exerciseable while the portions are raising.

But I answer, that case is clean differing from ours; for there the exception in the body of the limitation was but a partial exception, and the whole lands were not excepted. But in our case the whole Somersetshire lands were excepted

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out of the body of that limitation; and it is true that land is not excepted out of the deed, but out of that limitation: but the exception is a total and absolute, and not a partial exception. It absolutely excepts the lands (not only part of the estate of the land) out of that limitation. If I grant my manor of A. *except the jointure of my mother for life*, the reversion is not excepted: but if I *except the lands which she hath in jointure for her life*, it is excepted. And this is not like the case, which one of my brethren put, of an exception of Blackacre for years, with a limitation after of all the premises, except before excepted; for then the whole lands, or the whole estate in the lands, is not excepted.

But I return this objection thus: that by making two distinct limitations in the uses to Earl Henry, whereas he might more *facilè* and easily have limited the Somersetshire lands *quousque* among the other limitations of the estate, it rather argues that he intended to distinguish them in the powers from the rest, since he distinguished them in the limitation. And so when he hath these words in the power "except as is before excepted," the exception being absolute in the limitation, it must be so in the power.

One other objection was made, and much relied on, in the argument on the defendant's part at the bar. Upon the last clauses of the indenture, after the limiting the powers to Earl Henry for jointure and leases, it follows: "And that the said fine shall be, and the conusees shall stand and be seised of and for so much of the said premises as shall be so limited in jointure as aforesaid, or as shall be by him leased as aforesaid to the use of such wife, and also for the use of such lessees for and during their several estates so to them to be granted, and according to the effect of the same several leases;" which very words are also *terminis terminantibus* at the close of the powers to Earl William, and at the close of the powers to the Lord Fitzwarren, and neither enlarge, or diminish, or explain the matter of the powers, but are relative to the powers, be they what they will be. But then it is subjoined as followeth: "And as well of the reversion and reversions of all and singular the premises which shall be so assigned for jointure or leased by the said Earl Lord Fitzwarren, and Henry Bouchier, or by any of them respectively in manner and form aforesaid, as also of all other the said premises before excepted, except the said premises in High Holborn and in the county of Stafford, to the uses, limitations, interests, and purposes hereinbefore declared and expressed, and to or for no other use, intent, or purpose whatsoever."

I confess I understood not the force of the argument from

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hence. I think the inference is,—Because only High Holborn and the lands in Staffordshire are excepted here, that therefore Somersetshire and the portionary lands are to the uses before declared. No doubt of it, they are to the uses before declared of them in the limitations and provisoes themselves. This clause is but the winding up clause; which, though unnecessary, yet is usual in all conveyances where, after a limitation of uses, there is an interposition of estates by virtue of powers, to add that after the estates by virtue of these powers ended, the lands shall be to the uses before declared. But this declaratory clause adds not nor alters any thing touching the uses or the powers before declared; but contrarywise is tied up to them by several relative words, as the words *so respectively*, and *in manner and form aforesaid*. So that I know not how it could be more significantly expressed than as it is, that, after the several estates by virtue of the several and respective powers determined, the premises shall be to the former uses respectively.

I have done with this objection also.

And in regard the intention appears not clear that Earl Henry should have any power at all over these portionary lands, but barely an estate for life after the 12,000*l.* raised,—that the construction is to be made as of a deed and not of a will,—that the words of Earl Henry's power are literally fulfilled by the other lands, and these are not brought in to the same power but by a violent construction, and enforced addition of many words not expressed in the deed, and to the prejudice of the heirs at law to whom the same is also limited in remainder; I therefore hold that Earl Henry's power of making a jointure extends not to these portionary lands limited to the Lord Russell, or other the trustees for raising of portions; but that judgment ought to be given for the plaintiff.

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(Recitals in patents. Where the premises of a patent recited inaccurately the estates created by a will, those estates being partly vested in the crown, but referred to the whole will; and the *habendum* of the patent gave, in terms, estates commensurate with the estates in the will itself, being larger than the estate specified in the recital; this misrecital, or partial recital of the king's estate, shall not necessarily make the patent void.

Where separate estates in fee simple, qualified and absolute, are in the king, with other intervening estates of the same lands in other persons, *general words in the* habendum *of the king's grant* of the lands, being sufficient to extend to all the separate estates, but implying one entire *continuing* estate, cannot pass all these separate estates.

Where the king intended to pass one estate, and the patent in effect passeth more than one, the king is deceived, and the patent is void: and when, instead of one entire continuing estate, several estates in fractions are created by a patent, that patent is void.

Consideration of patents. Acts of Parliament confirming patents.)

Bridgman, C. J.

Edward Holland hath brought an action of trespass and ejectment against Sir Thomas Fisher, baronet, upon the demise of Sir John Brooke, knight, now Lord Cobham, of the manor of Rathwinter and Bendish Hall, and 10 messuages, 10 gardens, 1000 acres of land, 400 acres of meadow, 800 acres of pasture, and 500 acres of wood, with the appurtenances in Rathwinter, Ashdon, Hemstead, and Wimbush, the 10th October 1657, *habendum* from the 29th day of September then last past for five years. Upon not guilty pleaded the Jury found a special verdict; wherein they find

Harg. MS. No. 57. fol. 80. Ejectment.

Special verdict.

That George Lord Cobham was seised of the premises, and held the same in free socage; and had issue Sir William his eldest son, George, Thomas, John, Henry, another Thomas, Edmund, and Edward, sons, and two daughters, Elizabeth and Katherine; and 13 January, 1557, made his will, and thereby devised, *inter alia*, the premises in question to Sir

George Lord C., seised in fee of the premises, had issue eight sons and two daughters; and 13 January, 1557, made his will; devising the premises to his sons and daughters in strict settlement, with ultimate remainder to the right heirs of his youngest son.

(*a*) This judgment was delivered on the 22d day of November in Michaelmas term, 14 Car. II.; see 1 Keb. 405.; and there, p. 411., the report closes with "adjornatur, the Court being divided." The case is cited in 1 Keb. 616.; where also, and in 1 Lev. 73. and Raym. 53. in Wheatley *v.* Thomas, the will of George Lord Cobham, and the acts of parliament, which constitute the foundation of this case, were discussed on another point.

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William Brooks, his eldest son, for life; remainder to the first lawful begotten son of the body of Sir William and to the heirs males of the body of the same first son; and for default of such issue, to the second lawfully begotten son of the body of Sir William, and to the heirs males of the body of the same second son; and so to the eighth son of Sir William, and to all other his sons and to the heirs males of their bodies; with remainder to George Brooke for life, and so to his first, second, and third, and other sons, *ut supra*, and the heirs males of their bodies; with like remainders to Thomas, John, Henry, Thomas, Edmund, and Edward, and their sons; remainders to his daughter Elizabeth, late called by the name of Marchioness of Northampton, for life, and to her son and the heirs males of his body; and so to her other sons; with like remainders to his daughter Katherine, and her sons; with remainder to the heirs males of the body of his brother Thomas Brooke, and the heirs males of their bodies; remainder to the heirs of the body of Sir William Brooke his son, lawfully begotten, and to their heirs of their bodies; with like remainders to the heirs of the body of George, and other his sons, and their heirs of their bodies; and for lack of such issue, to remain to the right heirs of Edward his youngest son for ever.

29 Sept. 5 and 6 Ph. and M. he died seised; Sir W. B. being his son and heir, and afterwards W. Lord C. 1759 the youngest son died s. p. W. Lord C. had two sons, H. and G., and three daughters, and 6 Mar. 39 Eliz. died.

That 29 September, 5 and 6 P. and M., George, Lord Cobham died seised, Sir William Brooke being his son and heir. That 1579, Edward the youngest son died without issue. That Sir William, then Lord Cobham, had issue, Henry his eldest son, and George, and no other issue male; and three daughters, Elizabeth, Frances, and Mary; all which have issues of their bodies living.

H. Lord C. his first son entered, and was seised of the premises. 15 Nov. 1 Jac. G. was attainted of high treason. 25 Nov. 1 Jac. H. Lord C. was attainted of high treason. G. was executed, leaving issue Sir W. B. and two daughters. The second son of the testator left issue, D. B. and C. B.

That, 6 Mar. 39 Eliz., William, Lord Cobham died, Henry being his son and heir; and that Henry, then Lord Cobham, entered, and was seised *ut lex, &c.*

That, 15 November, 1 Jac., George was in due form of law convicted and attainted of high treason; and likewise Henry, Lord Cobham, 25 November, 1 Jac., was convicted and attainted of high treason. That, at the aforesaid times of the said attainders, George

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11 Nov. 2 Jac. the King granted the premises to D. B. and his heirs.

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had issue Sir William Brooke, and two daughters, and died. That George, son of George, Lord Cobham, had issue Duke Brooke, and Charles, and died; and afterwards, 11 Nov. 2 Jac., *(the king,)* by his letters patent did, *inter alia*, grant the premises to Duke Brooke and his heirs, *pro ut* by the letters patent (the tenor whereof follows *in hæc verba)* appears. By which letters patent the king, in consideration of 4269*l.* to be paid upon or before the 4th of May, 1605, and 3250*l.* on or before the 8th day of Nov. 1605, and 3250*l.* on or before the 4th day of May, 1606, to the king, his heirs and successors, at the receipt of the Exchequer by Duke Brooke, grants to Duke Brooke, *hæred. et assignat. suis, inter alia*, the said manors of Rathwynter and Bendish Hall, and other the premises; quæ quidem omnia et singula præmissa, superius per præsentes data et concessa, nuper fuerunt parcellæ possessionum et hæredit. Henrici, nuper Domini Cobham, nuper de altâ proditione attincti, ac de quibus ipse Henricus seisitus fuit in dominico suo ut de feodo talliato, sibi et hæredibus masculis de corpore suo legitimè procreand., virtute ultimæ voluntatis Georgii, nuper Domini Cobham, cum diversis remaneriis inde, prout in dictâ ultimâ voluntate plenius liquet. Damus etiam præfato D. Brooke, hæredibus et assignatis suis, omnia et singula messuagia, &c. et hæreditamenta situata et existentia infra com., vill., sive paroch. præd. prædicti Domini manerii, &c. et cætera præmissa per præsentes data et concessa, aut aliquas inde parcellas, quoquomodo spect., aut ut membr., &c., ac reversionum et reversiones præd. maneriorum, &c. et cæterorum præmissorum superius per præsentes præconcess. depend., vel expect. de, in, vel super aliquam dimissionem, vel concessionem, sive aliquas dimissiones, vel concessiones pro toto vel termino vitæ, vitarum, vel annorum, vel aliter de præmissis suis de aliquà inde parcella confectas. Damus etiam præfato D. Brooke, hæredibus et assignatis suis, quod ipse, hæredes et assignati sui, de cætero habeant infra, &c., tot, tanta, talia, &c., Cur., franchesia, &c., et hæredit., quot, &c., et in tam amplis modo, et formâ, pro ut præd. H., aut aliquis alius, &c., ac adeo plenè, &c. pro ut nos prædict. maneria habemus, &c., aut habere et gaudere debemus ratione attinct. præd. Henrici, nuper Domini Cobham, et Georgii Brooke patris sui,

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vel eorum alterius de altâ proditione attinct. Damus etiam ulterius, &c., præf. D. Brooke, hæred. et assignat. suis, prædicta dominia, maneria, &c., adeo plenè, &c., pro ut ea omnia, et singula præmissa, aut aliquæ inde parcellæ ad manus nostras ratione, vel prætextu, seu virtute dict. nuper attinct. dict. Henrici, nuper Domini Cobham, et præd. G. Brooke, vel alterius eorum, seu quocunque alio legali modo, jure, seu titulo devenerunt, seu devenire debuerunt; ac in manibus nostris existebant, seu jam existunt.

Damus etiam præfato D. Brooke, hæredibus et assignat. suis, remanere et remaneria, reversionem et reversiones nostras quascunque, in feodo simplici,

First habendum of the letters patent.

omnium et singulorum præmissorum, superius per præsentes dat. et concess., cujuslibet inde parcella, habendum præd. maner. nostr. de Rathwinter Hall, ac præd. maner. nostr. de Brandish Hall, &c., ac præd. messuag., terras, &c., ac hæreditat. superius per præsentes concess., ac rev. et revert. præd., ac cætera omnia et singula præmissa superius express. &c., præfat. D. Brooke, hæred. et assig. suis. quamdiu præf. H., nuper Dominus Cobham, de altâ prodit. attinct.; aut aliquis exitus, de corp. suo legitimè procr., aut aliquis exitus, de corp. præf. Georgii Brooke, fratris sui, de altâ prod. similiter attinct., et modo defunct., legitimè procreat.; aut aliquis exitus, aut aliqui exitus de corpore hujusmodi exitus legitimè procreat., vel procreand., hæreditabil. præmissorum, virtute ultimæ voluntatis dicti G., nuper Domini Cobham, vixerint; vel in vitâ existant, vel eorum aliquis vixerit, vel in vitâ existet, ad solum proprium opus et usum præf. D. Brooke hæred. et assign. suorum in perpetuum. Ac habendum et tenendum prædictum remanere et remaneria, rever. et revert. nostras quascunque, in feodo simplici, omnium et singulorum præmissorum superius per præsentes dat. et concess., quæ nobis per attinct. præf. H., nuper Domini Cobham forisfact. fuere, et cujuslibet inde parcell. præf. D. Brooke hæred. et assignat. suis in perpetuum ad solum et proprium opus et usum præf. D. Brooke hæred. et assignat. suorum, in perpetuum tenend. per servitia, per quæ prius tenebantur.

2d habendum.

With non obstante not finding of offices, and finding of office in Com. Essex, after the attainder of Henry, that he was seized to him and the heirs of his body

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of the said manors. Non obstante, non recitando, aut male, aliq. dimiss., sive concess.; et non obstante 18 H. 6.

Entry of D. B. 27 Apr. 3 Jac. Bargain and sale of the premises, to Al. P. duly inrolled.

And finds the entry of D. Brooke; and a bargain and sale by him, by indenture, 27 Ap. 3 Jac., to Alexander Prescott; and inrolled within six months.

P. 3 Jac. D. B. levied a fine to Al. P. and recovery wherein D B. was vouched.

That, P. 3 Jac., D. Brooke levied a fine to Alexander Prescott; that the same term a common recovery was had against Alexander Prescott, wherein Duke Brooke was vouched.

3 and 4 Jac. Act of parliament, enacting the forfeiture of the premises by H. Lord C. and G. B.

That in the parliament begun 5 November 3 Jac., and continued 27 Maii 4 Jac., and then prorogued to 18 November 4 Jac., it was enacted that H., Lord Cobham and G. Brooke shall forfeit, and the King have against them only and their heirs, and all claiming under them since their treason, all the manors, &c., wherein they, or either of them, had any estate of inheritance the day of their several treasons committed; and that from their attainders all their manors, &c. shall be vested and judged to be, and to have been, in the king's actual possession without any office.

Saving to all persons other than the Lord Cobham and George Brooke, and their heirs, claiming as heirs, all such right as they had, or ought to have had, at or before the treasons committed, in as large and ample manner as if the act had not been made; and all such right, entry, remainder, &c., which they now have, or hereafter may have only by virtue of any conveyance, or limitation made before the said several treasons committed, or done, this act or any thing therein contained notwithstanding, and in as large and ample manner as if this act had not been made. Provided that this act shall not extend to make void any grant or demise by the King to any person by letters patent under the great seal. And it is further enacted that all grants, bargains, sales, and demises made by the King under the great seal, since the said attainders, of any of the said manors, &c. to any person and persons and their heirs, shall be good and effectual in law to them, their heirs and assigns, to all intents, constructions, and purposes, according to the tenor, effect, and true meaning of the said letters patent.

Saving to every person and persons, and their heirs and

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assigns, other than Henry and George Brooke, and either of them, and their and either of their heirs claiming as heir or heirs by or from either of them, and all other persons claiming by them or either of them, to the uses or behoofs of them or either of them, or of their or either of their heirs, all such right, &c., reversion, remainder, hereditaments, and demands whatsoever, they or any of them had or ought to have had at or before the same several treasons committed or done in as large and ample manner as if this act had never been made. And also all such right, &c., reversion, &c., they or any of them now have, or at any time hereafter shall or may have only by virtue of any conveyance or limitation made before the said several treasons committed or done, this act or any thing therein contained notwithstanding, and in as large and ample manner as if this act had never been made.

27 Maii 4 Jac. D. B. died s. p. 5 Apr. 8 Jac. C. B. died s. p. 2 Apr. 2 Jac. Inquisition of information after the attainder of H., Lord C. 16 Jac. Al. P. died seised. 16 Car. a fine levied by John P., his heir; and J. P. dies. Entry of W.P. his heir and death in 1642. The heirs of W. P. Jane F. wife of defendant, and Anne P. defendant entered. H., Lord C, died s. p. Third son of testator died s. p. m. Fourth son of testator died s. p. Fifth son of testator died leaving two sons Cal. who died s. p. m. and the lessor of the plaintiff John Lord C. 30 Aug. 1643. W. B. the son of G. B. died s. p. m.; but leaving issue female. 1 Apr. 1645. J. Lord C. entered on defendant. 10 Oct. 1757. defendant entered again, &c.

27 Maii 4 Jac., D. Brooke died without issue. 5 Apr. 8 Jac. Charles Brooke died without issue.

The jury further find the inquisition, 2 Ap. 2 Jac., whereby it is found that, 9 Junii, the day of the treason committed, H. Lord Cobham was seised in his demesne, as of fee tail, to him and to the heirs of his body, of the manors and lands in the declaration.

They find the dying seised of Alexander Prescott, 16 Jac., John being his heir; and a fine by him 16 Car., and his death; and entry of William his son, and death 1642; and descent to his two sisters, Jane, married to the defendant Fisher, and Anne; and Fisher's entry in his wife's right. And find the several deaths of Henry Lord Cobham, without issue; Thomas, the third son of George Lord Cobham, without issue male; John, the fourth son, without issue; Henry the fifth son, and of Calisthenes his first son without issue male, and that John now Lord Cobham, the lessor, was his second son; and the death of William Brooke, the son of George, 30 August, 1643, without issue male, leaving four daughters yet living; and find the entry of John Lord Cobham, 1 April 1645, upon Fisher; and his entry again, 10 October, 1657; and lease to the plaintiff, *pro ut;* and entry of Fisher. But whether Fisher be guilty

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of the trespass and ejectment, or not, ignorant; *et poterit advisament; et si, &c.*

In this case the points being many which have been stirred, and the record being long, it will be the clearest way to state the case by parcels, as the points arising upon it shall come to be considered.

The plaintiff claims not by the patent to Duke Brooke. But the defendant's title being under the patent to Duke Brooke, several things have been moved against the validity of the patent; for though the plaintiff claim not by it, yet if he can destroy it, he destroys the recovery wherein Duke Brooke was vouched; for then Prescott, the bargainee of Duke Brooke, was not tenant to the freehold, and so the lessor's remainder not cut off. And the points stirred upon this patent have been—

First, Upon the consideration of the patent;

Secondly, Upon the clause of *quæ quidem* in the premises;

And, thirdly, Upon the limitation of the *habendum*.

And if by reason of these the patent is defective, it comes lastly to be considered, what operation the act of parliament of confirmation in this case will have, towards the making good of the grant, and supplying the defects of it.

Upon the consideration of the grant, or patent, the case is but this:—The King at the humble petition of Duke Brooke, and in consideration of 4060*l.* upon or before the 4th of May, 1605, and 3250*l.* upon or before the 8th of November, 1605, and 3250*l.* upon or before the 4th of May 1606, to be well and truly paid to him, at the receipt of the Exchequer, by Duke Brooke, his executors and administrators, grants to Duke Brooke, his heirs and assigns, *inter alia*, the lands in question. The money does not appear in the verdict to have been paid at the time.—The point hereupon intended to be spoken to is, whether the non-payment of the money which was the consideration of the patent, it being a consideration personal and executory, and subsequent to the grant, shall by matter *ex post facto* avoid the grant.

But I hold this point comes not in question in this case; for, first, admitting the non-payment of the money do avoid the patent, yet no advantage can be taken of it till office found; for the consideration must in such case of the King's grants be taken as a condition subsequent; and therefore as a condition broken it must be found by the office, and till such office found the estate still remains in the patentee. And admitting the recovery would be against one who was not tenant to the freehold, yet no such office being found it still remains a good

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estate and good recovery. Secondly, the verdict having not found, whether it was paid or not, it was left in *æquilibrio*; and it being matter in fact, the Court shall not intend, upon the verdict, the jury found either one way, or the other; for, if they did, the jury must be attainted by reason of the judgment of the Court, if they give it upon a wrong supposal of the truth of the fact; and therefore, if there be not, as I have said, sufficient without it to find for the plaintiff, the Court can give no judgment in it; but there must be in such case a *venire de novo*.

Where a Jury has omitted to find a special matter of fact, the Court cannot make it good by intendment. There must be, in such case, a *venire de novo*.

Quære, whether a patent is void upon failure of payment of the consideration, where the grant was made by the King for money to be paid to the Exchequer at a certain future day.

But for the point itself; if a grant be made by the King for money to be paid to the Exchequer at a certain day to come, and there is a failure of payment, whether this (admitting an office found) do avoid the patent, is a question not yet judicially determined.

If it be agreed that a consideration personal passed, as that he hath done service, or paid 100*l.* to the King, though it be false, it vitiates not the grant; and so Wroth's case, Com. 455. and 21 E. 4. and 37 H. 8. Br. Patents 4 and 100.) And so is my Lord Hobart, in Needler and Needham's case, fol. 231. But there he saith expressly, further, "that if a consideration be prescribed in the future, and be not performed, it will avoid the grant;" and instances, "if the King grant to J. S. in consideration that he shall serve the King in any office, or that he shall pay unto him 100*l.*; though these considerations in time past had done no hurt, yet in the future they are made material." And it is agreeable to the opinion of Hussey, C. J. 21 E. 4. 48. (*b*) a grant *eo quod relaxabit* to the King in the future, is void, if no release be made at the time prefixed for it; and I take the law to be accordingly. For, as it is said 5 Co. 94. in Barwick's case, "it is a maxim, that if the consideration, which is for the benefit of the King, be it executed or executory, or be it of record or not of record, be not true, or not duly performed; or if prejudice may accrue to the King by reason of the non-performance of it, the letters patent are void." A consideration personal past is not for the future benefit of the King, and therefore not material: but a consideration personal, executory, is for his benefit to have the money. And it is the meritorious cause of the grant; and, therefore, not being performed, is void. In Villier's case (*c*), this term, it was adjudged that verdict need not find payment of rent. *Ad solvendum* makes a condition in any part of the King's grant.

Verdict need not find payment of rent.

(*b*) 49 a.

(*c*) See p. 88. in the case of Berry *v.* White in these Reports, which appears to be the same case.

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Some false considerations, and some false suggestions, shall avoid the King's patent, and some not.

solvendum, in the case of the King, makes a condition in any part of the grant) C. Com. 204. a.; *ad faciendum*, or *ad effectum*, or *ex intentione*, it is one end or final cause of the grant; *a fortiori*, where it is the consideration and efficient cause of the grant; and the difference which Brooke, tit. Patents, 1. puts, that a false suggestion shall avoid a patent, not a false consideration, is clearly against law and experience, if it be generally taken. Some false considerations and some false suggestions shall avoid a patent, and some not.

The next question upon the patent ariseth upon the clause of *quæ quidem:* but, because they have a dependency upon the *habendum*, I must put them together, and thus single them out in the points, wherein the case stands thus,—George Lord Cobham had issue divers sons and divers daughters. His eldest son was William, after Lord Cobham, who had issue Henry Lord Cobham, and George Brooke (both attainted of treason, and George executed,) and divers daughters; and George Brooke had issue a son, Sir William Brooke, and several daughters; and Sir William is since dead without issue male, but having several daughters. George Lord Cobham, in the reign of Queen Mary, by his will entails, amongst other things, these manors in question, by virtue whereof, at the time of the attainder, Henry Lord Cobham was tenant in tail to him and the heirs males of his body, with remainder to Duke Brooke, another descendant, and the heirs males of his body, with other remainders in tale male (whereof one was in Sir John Brooke, Lord Cobham, the lessor) with remainder to Henry Lord Cobham, and the heirs of the body of William Lord Cobham his father, (an estate tail in remainder descending to him from the said William his father) with several other remainders to the heirs of the body of other sons of George Lord Cobham the devisor, and to the heirs of the bodies of his daughters, and with a reversion in fee in Henry Lord Cobham, as heir to Edward Brooke, the younger son of George Lord Cobham, in whom the estate in fee was lodged; so that there were forfeited to the King four estates.

First, the present estate tail of Henry Lord Cobham to him, and the heirs males of his body.

Secondly, the immediate remainder to George, and the heirs males of his body.

Then, after the interposition of several estates tail male to Duke Brooke, Sir John Brooke, and others, all which were spent but the lessor's at the time of the lease made, a third estate to Henry Lord Cobham, and the heirs of the body of William his father (which took in and lasted as long as there was any issue of the body of George his brother, whereof

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there are a great many still *in esse;* and which estate, in truth, is that under which the lands are now to be held; for the lessor is dead without issue male since the lease made, and the estates in tail male are all spent; but that is not in this case, we are now to argue, Sir John Brooke, the last in the male line, being then alive.

And, lastly, the Lord Cobham had and forfeited a remainder in fee simple to him and his heirs, expectant after the several other intervenient remainders to the heirs of the bodies of other sons and daughters of George Lord Cobham, divers of which are still unspent.

So the King, having in himself these forfeited estates, some immediate, others after the interposition of other intervenient estates, by his letters patent, dated 11 Nov. 2 Jac. for the consideration which hath been before mentioned, *de gratiâ speciali*, *&c.* grant to Duke Brooke and his heirs and assigns, *inter alia*, all these manors and lands in question, " *quæ quidem* omnia, et singula præmissa superius per præsentes dat. et concess. nuper fuere parcell. terr. possess. et hæredit. Henrici, nuper Domini Cobham, nuper de altâ proditione att., ac de quibus ipse Henricus seisitus fuit in dominico suo ut de feodo talliato, sibi et hæredibus masculis de corpore suo legitimè procreand. virtute ultimæ voluntatis Georgii, nuper Domini Cobham, cum diversis remaneriis inde, pro ut in dictâ ultimâ voluntate plenius liquet et apparet."

And after several other clauses (which shall be mentioned as there shall be occasion) the King grants to Duke Brooke, his heirs and assigns, " remanere et remaneria, reversionem et reversiones nostras quascunque in feodo simplici omnium et singulorum præmissorum superius per præs. dat. et concess., Habend. the said manors and premises to the said Duke Brooke, his heirs, and assigns, " quamdiu præfatus Henricus, nuper Dominus Cobham de altâ proditione attinct. aut aliquis exitus de corpore suo legitimè procreand., aut aliquis exitus de corpere præfat. Georgii Brooke, fratris sui, de altâ proditione similiter attinct., et modo defunct. legitimè procreat. vel procreand. hæreditabil. præmissorum virtute ultimæ voluntatis dicti Georgii, nuper Domini Cobham, vixerint, vel in vitâ existent, vel eorum aliquis vixerit, vel in vitâ existet," to the use of the said Duke Brooke, his heirs and assigns and " Habendum remanere et remaneria, reversionem et reversiones nostras quascunque in feodo simplici omnium et singulorum præmissorum superias per præsentes dat. et concess., et quæ nobis per attincturam præfati Henrici, nuper Domini Cobham, forisfacta fuere, et cujuslibet inde parcell. to the said Duke Brooke, his heirs and assigns, to the use of him, his heirs and assigns."

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Upon the premises, thus coupled with the *habendums*, there have been these questions raised :—

First, it being in the *quæ quidem* recited, that the lands were parcel of the possession of Henry Lord Cobham, attainted, *ac de quibus* he was seised in tail to him and the heirs males of his body, with divers remainders over, as by the will of George Lord Cobham it more fully appears:—Whether this clause shall be said to be the information or suggestion of Duke Brooke the patentee ; and what is the consequence of it, —if it be the suggestion of the party, on the collection or affirmation of the King.

And, 2dly, Here being a recital " That Henry Lord Cobham was seised to him and the heirs males of his body, with remainders over, as by the will of Lord George appears ;" and the *habendum* being " so long as Henry Lord Cobham, or any issue of his body, or any issue of the body of George Brooke, inheritable by virtue of the will of George Lord Cobham, shall live," which extends it not only to the heir male, but to the heir of the body of Henry, and to the issue of George as being within the compass of the entail, which Henry Lord Cobham had to him and the heirs of the body of William his father whether upon these premises, coupled with the *habendum*, here is not such a misrecital, or partial recital of the King's estate, as shall make the patent void for that cause.

And then upon the *habendum* itself, singly taken, several points have been touched, which I shall put anon.

The King having several estates forfeited to him by the attainders of Henry Lord Cobham, and George, some immediate, others after the interposition of other articles, grants the land with one entire *habendum*, " quamdiu Henricus Dominus Cobham, aut aliquis exitus de corpore suo, aut aliquis exitus de corpore of George, heritable of the premises, vixerit, vel in vitâ extiterit ;" which general words are sufficient to extend to all the several estates,—whether all these estates shall pass by fractions.

And that also hath two reasonable considerations :—

First, whether the King, intending one entire and continuing estate by his grant, it can pass by fractions ?

Secondly, in regard the grant carries not the whole estate, but reserves some part of it to the King—whether any thing at all pass ? and if it do, what the operation of it is ? For the estate, so long as William had heirs of his body, was forfeited to the King ; and he grants it out so long as Henry and George had heirs of their body, which is but part of that estate ; for that all the rest of that estate (as long as there are

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daughters, or daughter, children of William,) is left in the King, and not granted over.

And the last thing to be considered is,—whether, upon the limitation, *so long as there is issue, and issue of issue*, as it is here penned, an estate of inheritance be created.

First, I hold the clause, " Quæ quidem omnia, &c. nuper fuere parcellæ possessionum Henrici, nuper Domini Cobham, de altâ proditione attincti, ac de quibus ipse seisitus fuit in dominico suo, ut de feodo talliato, sibi et hæredibus masculis de corpore suo legitimè procreat. virtute ultimæ voluntatis Georgii, nuper Domini Cobham, in diversis remaneriis inde pro ut in dictâ ultimâ voluntate plenius liquet," shall be taken in law to be the suggestion of the party; and not imply the collection or affirmation of the King.

(*d*) Before Legat's case, it was much controverted, whether these kind of clauses with *quæ quidem* should be taken to be the information of the party; and whether the grant should be void, for the falsity of them. The reason was, because if a grant be made " de manerio de D., quod quidem manerium nuper fuit parcella terræ J. S. de altâ proditione attinct.; or, quod quidem manerium nuper per eschætam ad manus nostras devenit," it was said, the grant was certain and sufficient of itself; et quod, demonstrandi causâ, additur rei satis demonstratæ, frustra fit, 10 Co. 113. a.; and shall not avoid that which went before; and therefore they took this difference:—If the grant was that the King granted manerium de D. nuper parcellam possessionum J. S. de altâ proditione attincti, or usum valoris 100*l.* &c.; there, being parcel of the grant, it is void, if false: but if it were with a *quæ quidem*, whether before or after the *habendum*, it being a distinct clause, it doth not vitiate the grant. And, according to this distinction, I have heard somewhere, that it was the practice of Popham, when he was attorney, always to have the words of qualification or restraint to be parcel of the grant: as manerium de D. annui valoris 10*l.*; or manerium de D. *nuper parcellam terræ et possessionum J. S. de altâ proditione attincti;* and not with a *quæ quidem præmissa* were annui valoris; or were parcell. possess. J. S. attinct. &c. And he continued of that opinion after he was a judge; and, therefore, in Mason and Chambers's case, 2 Jac. now in Cr. 2 Rep. 34., he held, if the King grant manerium de D., *quod quidem manerium* is of the annual value, or rent of 4*l.*, though it be not of that value; or, *quod quidem habuit* per le attainder J. S. he held the lease to be

(*d*) The printed report in 1 Keb. 406. seems to mis-state what Sir Orlando said of Popham's practice, and of the effect of Legat's case.

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good, because there was a certainty before, and the addition with a *quæ quidem* is but to add another certainty; and he intended to pass the manor. But if the King granted the manor of D. annui valoris, or redditus 4*l.*, and it is set under a greater rent, or appears upon record to be of a greater value, it being in one sentence, he agreed it is naught; for the King's intent appears, not to grant a thing above such a value. And so Popham, in case of grants, *quæ quidem, &c. concelata fuerè*, doubted of such grants; and, therefore, when he was attorney, he made them with a clause of proviso that they were not concealed. B. 6. 169. 10 Co. 110.

But Legatt's case, being in 11 Jac. after those opinions, hath resolved the contrary. The very principal case is of a grant of two pieces of land, called Nettlehampstead and Weekman's, containing fifteen acres in Wymondham, in com. Norfolk, nuper in tenura Johannis Colman, ac nuper monasterio de Wymondham quondam spectant: "Quæ quidem præmissa a nobis, &c. concelata fuere." Although there was a certainty in the thing granted, by particular names, in the content fifteen acres, in the town, county, tenant, and in the title, to the monastery of Wymondham belonging; yet it was adjudged the *quæ quidem* being false, avoided the patent, and that it shall be taken to be the suggestion or information of the party: and so also it is resolved in Vowe's case there cited; and then *quod restringendi causa additur in casu Domini Regis, si falsum sit, vitiat chartam.* The reason is, as it is said by my Lord Chancellor Egerton, 1 Co. 52. in Alton Wood's case, "The King hath the charge of the public, and cannot attend his private business; and the grants which he makes, he makes as King, and therefore as King he ought to be informed that his purpose and effect may take effect;" or otherwise as King, and "jure Regio" as it is said 10 Co. 113. b. "he shall avoid them" And it being matter merely of fact, the King (who is supposed not to know the private affairs and interests of persons but by information) in law is supposed to have it from the party concerned.

The grants which the King makes, he makes as King, and as King he ought to be informed that his purpose may take effect; or otherwise as King he shall avoid them.

In our case it is somewhat stronger; for the grant is expressly recited to be, *ad humilem petitionem* of Duke Brooke; and though the grant is, *ex certa scientia et mero motu, et gratia speciali*, yet these being words of course, and put in by the clerks without special warrant, shall not take away the presumption of law, that that which is matter of fact alledged in the patent shall be taken for the suggestion of the party, as it is agreed both in Alton Wood's case, and Legat's case;

10 C. 112. b. In grants of the King, the words *ex certa scientia, mero motu, et gratia speciali*, are words of course, and do not take away the presumption of law, that the fact alleged in the patent shall be taken for the suggestion of the party.

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much less where it is expressly alleged to be at the petition of the patentee.

So that I take this clause of *quæ quidem* here to be the information of the party to the King. It is clear it is so as to the first part of it, " quæ quidem, &c. omnia et singula præmissa nuper fuere parcellæ terræ et possess. Henrici, nuper Domini Cobham, de altâ proditione attinct." If they were not his lands, they pass not by the patent; and the reason is the same for the other words, " ac de quibus ipse Henricus seisitus fuit in dominico suo ut de feodo talliato sibi et hæredibus masculis de corpore suo legitimè procreandis."

6 Co. 55. it is. *virtute cujus nos, quæ quidem literæ paten. adtunc concelat. fuere.*

For, first, they are part of the same clause; and if it shall be taken the suggestion of the party as to part, the same reason holds it should be so for the residue of the clause.

But, 2dly, it concerns the King's title; for as the other part shews how the King came by it, *viz.* by the attainder of Henry Lord Cobham; so these words, " de quibus Henry Lord Cobham was seised in tail," shew what title the King has in it, *viz.* a fee determinable by the failure of issue male of Henry Lord Cobham; and the rule *pro ut* in Legat's case, upon such kind of grants, let the *quæ quidem*, or matter in fact, be alleged in what part soever of the patent, whether before or after the habendum, (though upon the authority of Green, Chief Justice, in 29 E. 3. 8. some made a difference) holds where the King is deceived in his title, or in the value which he intends to grant, or in the restraint, which for his profit or avail he intends to make. There the falsity of the *quæ quidem*, or matter in fact, shall vitiate the patent; and, therefore, if it were not true that Henry Lord Cobham were seised in tail to him and the heirs males of his body, I do conceive the patent would be void.

10 Co. 114. a.

10 Co. 113. b.

[In my Lord Chandos's case (*d*) they were distinct clauses. The surrender ad opus nostrum cancelland. *virtute cujus eædem literæ patentes tunc et ibidem fuerunt cancellatæ, virtute cujus nos de manerio prædicto seisiti fuimus.* These two, virtute cujus, were the inference or affirmation of the King, upon the suggestion of the party; they were distinct clauses: but here all is one entire clause. There is a great difference between *virtute cujus Rex seisitus*, which is but an inference, and *de quibus* the party *fuit seisitus*, which is an affirmation of the party, not drawn out of what went before.]

The next thing is, upon this partial recital of the King's estate.

Here is no misrecital: it is a true but not a full sug-

(*d*) 6 Co. 55.

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gestion or affirmation. It is true that Henry Lord Cobham was seised to him and the heirs males of his body. But it is as true, that he was also seised of another estate (expectant after several remainders to Duke Brooke the lessor, and others, all which are now spent,) to him and the heirs of the body of William Lord Cobham his father, which was forfeited by his attainder. And then the recital in the quæ quidem being, " that Henry Lord Cobham was seised to him and the heirs males of his body, with remainders over, *pro ut* by the will of George Lord Cobham it appears; and there being no recital of the estate which Henry Lord Cobham had to him and the heirs of the body of William Lord Cobham, and the *habendum* being " so long as Henry Lord Cobham, or any issue of his body, or any issue of the body of George Brooke, inheritable of the premises by virtue of the last will of George Lord Cobham, shall live," which extends it not only to the heir male which was recited, but to the heirs of the body of Henry, and to the heirs of the body of George, as being within the compass of that entail by the heirs of the body of William, whether in respect of this recital, but in part of the King's estate, and granting more than is so recited; the patent shall not be void.

It is not necessary for the King to recite how an estate comes to him, by attainder or otherwise; nor what estate a person attainted had. 1 Co. 49.

I conceive there is no such misrecital or recital in part, as shall make the patent void; for I conceive there was no necessity for the King to have recited, either how the estate came to him, by attainder, or otherwise; nor what estate the person attainted had. It is said by Periam, in Alton Wood's case, 48. a. and not denied by any, " the King needs not in any case recite his own estate;" and it is the express resolution in the said case, " if the King had a qualified fee, so long as the person attaint hath heir of his body, and he grants it to one and his heirs, or a fee conditional; and he grants it to one and his heirs absolute, it is good in both cases, and without a recital; for in both cases the King hath a fee simple, and grants a fee simple;" and, therefore, in the principal case of Alton Woods it is said, " they went about to avoid the patent, not because the King did not recite his own estate, but because he granted such an estate as would not stand with his own estate." And in Hussey's case there cited, but more fully in M. 38, 39 Eliz. 3 Cro. 519. " admitting the King had two base fees in him, and grants the lands to J. S. and his heirs, the patent is good, both for the base fee and for the reversion, without reciting the King's estate." And so is my Lord Chandos' case,—where the King hath a reversion expectant upon an estate tail of a common person, if he grant the land it is good, because he need not recite the particular estate. And though he grant it as in possession, the reversion passes; for he need not recite the particular

3 Cro. 519. C. C. 18.

6 C. 56.

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estate made by a common person. And where the King makes a lease for life, or years, and after grants the fee without recital, it is void; not because he recites not his estate, but because he is deceived in granting a possession where he had but a reversion; and the lease appeared of record, and therefore it is not holpen without a *non obstante, non recitando*, 1 Co. 50. a.

The King may grant without reciting his estate; but when he does recite, a misrecital which is material in title, value, or restraint for the benefit of the King, shall vitiate the grant. A recital declares the meaning of the King, and is always the best direction for the construction of his grant.

But, secondly, though the King might have granted without a recital of his estate; yet, when he does recite, I take it in case of a misrecital (as I said before) which is material in title, value, or restraint for the benefit of the King, it shall vitiate the grant. And in case of a partial or too short a recital in the King's case, it may restrain it, and, in some cases, also vitiate it; for "the recital declares the meaning of the King, and is always the best direction for the construction of his grant," as it is said, 1 Co. 50. b. Alton Wood's case.

Construction of the King's pardon.

If the King pardon J. S., *ex certa scientia, omnia debita*, all debts which he owes as viscount are pardoned, 1 H. 7. 13.: and is, and is agreed to be, good law, by the Justices in Alton Wood's case, fol. 49. Yet, I conceive in that case, if the King had recited that J. S. had owed him a debt by bond, and pardon him *omnia debita*, this recital shall so far declare the King's meaning, that it shall not *pardon* (*e*) debts as viscount *ratione officii*, but only debts in his private capacity. And that I conceive, is expressly warranted by the case put by the Justices in Alton Wood's case. The King recites, that whereas J. S. is indebted to him, as executor of J. H., he pardons him, *ex certa scientia*, omnia debita, this shall not discharge his proper debt; and yet, clearly, it would have discharged it, if such recital had not been.

And, therefore, in our case, I do conceive, if the King, reciting that Henry, Lord Cobham was seised to him, and the heirs males of his body, did grant, habendum to patentee, *quamdiu aliquis exitus Henrici Domini Cobham vixerit*, it should be understood only, quamdiu aliquis *talis* exitus, that is, such issue as is before recited, that is, *issue males*, should live. And I think, for my opinion, it would not have been void, though the words extended further, to all issue of Henry generally; for, though the truth was, that Henry was seised not only of an estate tail, to him and to the heirs males of his body; but also he had an estate in remainder, to him and to the heirs of his body; yet, as I said before, I think the words would have been restrained, as in the case where it is recited,

(*e*) "Pass" in the manuscript.

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that J. S. is indebted to the King as executor, the King pardons J. S. omnia debita, it is good as to debts quatenus executor, and is not void in the whole, because the words are *omnia* debita; and so here, if that were our case, the recovery, wherein Duke Brooke was vouched, would be good at the time of the action brought, but would not touch upon the estate which was in Henry Lord Cobham, and the heirs of the body of William, the estate tail male since failing, is now in being.

But, thirdly, as this case is, and as to this present point, I conceive here is no such misrecital, or partial recital, as shall make the grant void for that cause, if there were nothing else in the case.

The ground of this recital but in part, of the estates forfeited, appears in the close of the patent, that an office had been found, that Henry Lord Cobham was seised of the premises to him and the heirs of his body; and to set that right besides a non obstante in the patent of that office the king recites, as the truth was, that he was seised to him and the heir males of his body, so that the intent of particularising the estate in this clause was to set right a former mistake;—that whereas the immediate estate in possession was found by former office to be to him and the heirs of his body, it should be understood to be according to truth, to him and to the heirs males of his body:—so that the clause was added, *non demonstrandi causa, sed corrigendi causa;* for the setting right that which was before mistaken, and for no other cause.

[But I conceive the reference to the will alone had not been sufficient to have made this a good recital; for the King would not have known his estate by that will,—whether Edward was dead without issue—or what daughter William, Lord Cobham had—though I agree, it is good enough by way of reference for so much as appears in the will.]

Reference to a will good enough for so much as appears in the will.

Then, though it is the information of the party, yet it is a full information so far as concerns the rectifying that mistake, and to let the King know he had other *estates;* (*f*) for the words are, "that Henry was seised to him and the heirs males of his body, virtute voluntatis Georgii nuper domini Cobham, cum diversis remaneriis inde, pro ut in dicta ultima voluntate plenius liquet et apparet." It says there were other remainders; and that shews he deceives not the King. And if the King would be ascertained of them, there is a reference to the will; and *id certum est quod certum reddi potest,* as in Whistler's case, 10 Co. 63; and 9 Co. 30. Strata Marcella's

(*f*) "Mistakes" in the manuscript.

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case, " the King grants to J. S. such liberty as Queen Katherine had ;" that is good enough, because by that reference they may be made certain ; and the cases cited by my brother Brown are to that purpose.

And, thirdly, it appears in the very body of the patent itself, that the King took notice he had other estates in those manors, forfeited unto him, besides this estate tail recited to Henry and the heirs males of his body : for example,

First, by one clause the King grants all franchises within the manors *adeo plene* as he ought to have them ratione *attincturæ Henrici Domini Cobham*, or of his brother George.

And, secondly, by another clause he grants the manors *adeo plene*, as they came to the King's hands *ratione attincturæ of* Henry and George, or either of them, or by any other title.

And, thirdly, the habendum itself takes notice that George had issue inheritable of the premises *virtute ultimæ voluntatis* of the Lord Cobham.

And, fourthly, by a special habendum, the King grants his reversion and reversions, remainder and remainders in fee simple, which were forfeited by the attainder of Henry, Lord Cobham ; which shew the King well understood that he had other estates forfeited to him by those attainders besides that to Henry and the heirs males of his body. And though the grant of the reversion, or remainder in fee simple, which the King had, doth pass only the remainder in fee simple which was in Henry and his heirs, and not the estate which Henry had to him and the heirs of the body of William, his father, (for the grant by that habendum is of the remainder in fee simple, which was forfeited by Henry, but that estate to him and the heirs of the body of William was a remainder in tail, and though it be fee simple in the King, yet it was not a fee simple forfeited to the King,) yet it is enough to our present purpose to shew the King was not deceived, but knew he had other estates besides that to Henry and the heirs males of his body. And, therefore, I do conceive that, notwithstanding the special mention of the estate of Henry, Lord Cobham, to be an estate tail to him and the heirs males of his body in the *quæ quidem*, the patent is good enough, if there be nothing in the habendum to make it void.

The next things considerable are upon the habendum itself; wherein, to make way to the main point, I must state the case. —Henry, Lord Cobham, at the time of the attainder of himself and his brother George, was tenant in tail to him and the heirs males of his body, with remainder to his brother George and the heirs males of his body, with several remainders to the other sons or descendants of George, Lord Cobham, the com-

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mon ancestor, and the heirs males of their bodies, whereof the last was the lessor, John, Lord Cobham, with remainder to Henry, Lord Cobham, and the heirs of the body of William, Lord Cobham, his father, (which descended to him from his said father,) with several other intervenient remainders to several other sons of the said George, Lord Cobham, the common ancestor, and to divers others yet in being, with the remainder in fee to Henry, Lord Cobham. By the attainder these four estates were forfeited, *viz.* the estate tail to Henry and the heirs males of his body,—the estate to George and the heirs males of his body,—the estate to Henry and the heirs males of the body of William, his father, and the remainder in fee which was in Henry and his heirs.

The point then is this:—these four estates being forfeited to the King, the King makes the grant to Duke Brooke and his heirs, habendum "to him, his heirs and assigns quamdiu Henry, Lord Cobham, or any issue of his body, or any issue of his brother George then deceased, inheritable of the premises by virtue of the last will of George, Lord Cobham, should be in being;"—whether this be a good grant to pass all or any part of the said three first estates forfeited to the King? And the main doubt rests upon this—that this habendum intends one *continued* estate,—so long as Henry or George have issue—whereas the King's estates will not bear it; for his first estate which he hath will bear only an estate so long as Henry or George have issue *male*, and not so long as they have issue. And if this habendum do carry an estate so long as they have issue, according to this letter, then it must carry another estate after all other remainders to the other sons of George, Lord Cobham, and the heirs males of their bodies were spent.

To clear the difficulties of this point, which is the great point of the case, I must lay down these grounds.

First, That the King hath by these attainders several fee simple estates in him, some of which are qualified or limited, and the last absolute. I must agree if the King, having a fee simple to him and his heirs, grant the land to J. S., and his heirs, so long as B. hath heirs of his body, the King hath no remainder, or reversion, but a possibility; and, therefore, cannot limit a remainder over no more than a common person, who gives lands to J. S. and his heirs, so long as B. hath heirs of his body. But if an estate tail be turned into a fee simple, a reversion or remainder may be expectant upon it; for the estate, before it was turned into a fee simple, was capable of both. And that is our case here: several estates forfeited were fee simple in the King raised out of estates tail, which the Lord Cobham and George his brother forfeited.

By the attainder of a tenant in tail, the forfeited estate raised out of the tenancy in tail, is a qualified fee simple. 10 Co. 97. Seymor's case. 10 Co. 98.

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But, secondly, that though four estates, as I said, are forfeited; that is, first, the estate tail in Henry, Lord Cobham, and the heirs males of his body. Secondly, The estate tail to George and the heirs males of his body. Thirdly, The estate to Henry and the heirs of the body of his father;—and, fourthly, The fee simple in Henry and his heirs.

Yet the King by the forfeiture hath but three estates; *viz.* one in fee simple, determinable by the failure of issue male of Henry and George; for George's estate being immediately dependent upon Henry's estate, to him and the heirs males of his body, and no intervention between them, they are but one consolidated estate in the King, so long as Henry or George had issue male, for the King cannot have two estates in fee together, where they are immediate, and no other estates between them, as appears by Austen's case, and Hussey's cited before; and though in those cases the King is in point of reverter, yet the reason is the same where the King had no reversion before. As if tenant in tail, reversion in fee to the tenant in tail be attainted, the King hath but one fee. And it makes no difference where they are all fees determinable, or qualified, and where one of them is absolute; for being immediately expectant or upon the other, they are but one estate; for *lex non operatur inutilia;* and it were fruitless and in vain to say the King by the attainder of Henry and George hath one fee so long as Henry hath issue male, and another fee so long as George hath issue male; for it is no prejudice to any to have them consolidated, and it is agreeable to law that there should not be multiplying of fee simples. The law doth not delight in or allow a fee upon a fee, but for mere necessity where it cannot be otherwise. And, therefore, if a villein be tenant in tail, and the lord enter, he hath one fee, and the donor another, for necessity: but if the Lord enfeoff the donor, he hath but one fee.

The King cannot have two estates in fee together, where they are immediate, and no other estate betweenthem. C. C. 18. Com. 349. 248.

The law doth not allow a fee upon a fee, but *for mere necessity, where it cannot be otherwise.* 15 E. 4. 6. C. C. 106. (g) 18. a.

But then in our case here, there being several remainders intervenient between these estates in tail male forfeited by Henry and George, and the estate to Henry and the heirs of the body of William, his father, that estate to him and the heirs of the body of William his father being also forfeited, the King hath another fee simple determinable by the failure of the heirs of the body of William. And this is a distinct estate in the King of necessity, because of the interposition of other intervenient estates which keep them asunder; and for the same reason, Henry having the remainder in fee to him and

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(g) This reference to Lord Coke's Commentary 106. seems to be incorrect.

his heirs after the intervenient estates, this estate is also forfeited to the King: but it is in the King as a distinct fee simple for the reason before mentioned, other men's estates interposed. So that the King (as I said) hath three estates in fee simple, two qualified, and a third absolute; and these three the King might severally grant as distinct estates, either to one or more persons; and he might keep one and grant the others; and in our case it appears by the several habendums that he granted the absolute remainder in fee as a distinct estate.

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These, I conceive, are undeniable grounds.

For, first of all,—I say, and therein differ from my brethren who argued against me,—that the King did not intend to depart with this whole estate he had in this second remainder or fee, (which was whilst there was issue of the body of William, Lord Cobham,) but only for so long time as Henry or George had issue inheritable: when those failed, the King would have it again whilst William had issue. For we must gather the King's intent out of the words of his grant; and, therefore, to say that the King by this habendum did intend to pass the whole estate which Henry had to him and the heirs of the body of William, his father, it is gratis dictum, and contrary to the express words: but if it were true, it makes against the patent; for then the King was deceived in the estate which he intended to grant by it, for he thought he had an estate only so long as Henry and George had issue. But I take it clear, this habendum passes no more than whilst Henry and George have issue; and it leaves a remnant of that estate, (*viz.* when William had issue of his body, after failure of issue of Henry and George,) in the King; which remnant by no words of this habendum is taken out of the King.

The King's intent must be gathered out of the words of his grant. (*h*)

Secondly, This grant, *quamdiu,—so long as Henry, Lord Cobham, or any issue of his body, or any issue of his brother George shall be in being;* if it take effect, it must be drawn out of the two several estates in fee which remain severed in the King,—the estate determinable for default of issue male of the bodies of Henry and George,—and the estates determinable for default of issue of the body of William, Lord Cobham; for the estate, so long as Henry and George have issue of their bodies, in the habendum, cannot be drawn only out of the first estate which lasted so long as they had heirs males of their bodies, and no longer. But it must arise also out of the King's second estate, which the King had so long as William had heir

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(*h*) Holt, C. J. said, that a legal intention is not necessary in the King, but only a moral intent. Skinner 661.

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of his body, and take a part of that, *viz.* whilst Henry and George have issue, and cease when there is a failure of their issue.

Hence I infer that since the estate to Duke Brooke and his heirs, whilst Henry and George have issue, must arise out of the King's estates, and there is an interposition of other estates between them, that if the habendum pass any thing at all, it must pass two estates to the patentee: but the King intended only to pass one estate, and so it is void because the King is deceived.

Where the King intended to pass one estate only in a patent which in effect passes more than one, the patent is void, because the King is deceived.

But, secondly, which is the main reason in the point, the King by this habendum did intend to grant one entire estate, continuing quamdiu, so long as any issue of the bodies of Henry and George inheritable of the premises were in being. But it cannot pass here a continued estate, but by fractions; for the patentee, as I have often said, shall enjoy it, by virtue of the habendum, only while there is issue male of Henry and George. Then during John, Lord Cobham's estate, who is the lessor, and the other estates in tail male to the other sons of George, Lord Cobham, and the heirs males of their bodies, the said John, Lord Cobham, and other males would enjoy it, and dispossess the patentee; and when these are spent, (as in truth they are spent since this action brought) then again the estate must (by this habendum) return to the patentee as long as the heirs of the body of Henry and George continue; and when that is spent, then this grant to cease again, and other estates to interpose. So then if the King cannot pass such an estate as he intended, he is deceived in his grant. The King intended to pass one entire estate to Duke Brooke, the patentee, and his heirs, so long as Henry, Lord Cobham, or George his brother, had issue. But such an estate cannot pass according to the King's intention, and therefore he is deceived.

Where the King intended to grant one entire *continuing* estate, and estates in fractions are created by the patent, this does not pursue the intent, and the patent is void.

To prove the first of these propositions,—that the King intended to pass one entire estate, appears by the very words; for the grant to the patentee and his heirs is, *quamdiu, so long as Henry or George have issue.* The word *quamdiu* implies a duration, without interruption or intermission. If Blackacre is granted to A., *quamdiu* B. suffers J. N. to enjoy Whiteacre, if B. enter into Whiteacre, the grant of Blackacre ceaseth. Now, though B. suffer J. N. to re-enter, and re-enjoy Whiteacre, yet the estate by the *quamdiu* is determined, And so, if lands be granted to A. and his heirs, *quamdiu* B. hath heirs of his body, if B. die without heir of his body, the estate ceaseth; and though the wife of B. be enseint, and after have a son, yet it shall not revive. That is the express case put by Yelverton, in Poole and Needham's case, in 6 Jac. B. R. 149.; for it was

The word *quamdiu* implies a duration without interruption.

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a collateral determination which, being once interrupted, shall not be set on foot again. The true reason is, the *quamdiu* is a word of limitation of a continued uninterrupted estate. And, indeed, to have an estate cease, and rise again, the proper words should be *toties quoties*, and not *quamdiu*; which, as I said, implies a continued estate.

To have an estate cease and rise again, the proper words are *toties quoties*.

(*i*) The other proposition, that one entire estate cannot pass, according to the King's intention, by the limitation of this habendum, needs no further proof; for, as hath been said, the King's first estate must cease when the issue males of Henry and George fail. But the estate, according to the limitation, ceaseth not by the failure of issue male of Henry or George Brooke, but (*j*) by the failure of issue male and female; and so the King is deceived in his intention. For, by the letter of the habendum, the patentees will have it so long as Henry and George have issue male; those failing, this estate ceaseth; and when the rest of the males cease, the patentees must have it again of another estate; and so the patentee hath not one entire but several estates, with the interposition of others.

The King's grant is void, if the operation of it is prejudicial to a third person.

Another reason why I conceive this grant is void, is this,—that this grant is to the prejudice of a third person, that is, to those in remainder: for the grant being,—so long as any issue of the body of Henry or George shall be in being,—when issue male fails Sir John Brooke, the lessor, and others which were in the remainder, to them and the heirs males of their bodies, are prejudiced. For if he in remainder shall bring his action against the patentee, the patentee may pray in aid of the King, and it shall be granted to him for the King's grant. If it had been in the case of a common person, it would have carried a warranty by the word *dedi*; and where a common person is bound to warranty, there shall be an aid prier of the King, if the estate granted by the King be not determined. But the estate which is mentioned to be granted by this habendum, is still in being after failure of issue male of Henry and George; for it is to continue by the purport of the habendum, whilst they have issue female, and therefore gives cause of *aid prier* against Sir John Cobham, and all those in remainder in tail male, who ought to have enjoyed the land: but otherwise it were of a grant determined. And, therefore, if the patent had been only so long as Henry or George had issue male, the grand patentee's estate determined by failure of issue male; and there could be no *aid prier* upon an estate determined.

Where a common person is bound to warranty, there shall be an *aid prier* of the King, if the estate granted by the King be not determined.

There could be no *aid prier* upon an estate determined.

(*i*) This suggestion is not in the printed book, 1 Keb. 408.

(*j*) The manuscript is "but *when* by the failure, &c."

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(*k*) Whether or no in this case he in remainder might enter upon the patentee (admitting the grant, *quamdiu there is heir of the body*, were good) may be some question; for that it appears the King granted not out his whole estate, but part still remains in him,—and will come anon to be considered in this case. But however if it be a prejudice to him in remainder in his action, which the law gives him, that is cause enough to avoid the patent; because by it a wrong is done to a third person; and we know the great delays that come by *aid prier*, and, after aid granted, the long time allowed to make searches for the King's title.

Where the King's grant implies a warranty, he ought in honour to make good his grant to the patentee.

Besides, in the King's grant, if this habendum stands good, the dedimus implies a warranty, and in honour he ought to make good his grant to the patentees. And so the King must answer the value of the prejudice to the patentee during the time, after failure of issue male of Henry and George, John Lord Cobham, or other the heirs male, shall enjoy the land; and so the King is not only deceived, but prejudiced, in his grant.

1 Co. 47. b.
1 Co. 50. b.
7 Co. 78. Engleficld's case.
1 Co. 52. a.

And these I conceive to be the reasons why "if the King be tenant for life, and he grants the land to another and his heirs, or the heirs of his body," though this was by Periam, Chief Baron, held to be "good during the King's life," yet it was agreed by Popham and the rest of the Judges, in Alton Wood's case, that "such a grant shall be void, and shall not be good to pass his estate for life." And Chancellor Egerton said, that "he had also seen a report in King Henry the Seventh's time to that purpose;" yet in truth the King's grant there passed less than the King intended to pass. But the reasons are those that I cited before:—the King was deceived in his grant;—he took upon him to grant a greater estate than he could legally grant;—the grant was a prejudice to the King as to his warranty, and to him in remainder in respect of *aid prier*, and in some cases as to his entrés;—and gives colour, at least, to put him to his petition of right; which last reasons, though not in the book, yet are in the case.

If the King having a base fee, *so long as J. S. have issue male of his body*, grant the land, *so long as J. S. hath issue of his body*, this grant is void.

Again, if the King hath a base fee, so long as J. S. hath *issue*

(*k*) In Wheatley *v.* Thomas, 1 Keble 616, it is said by Glyn, counsel, that "in Holland *v.* Fisher, in C. B. *all the Court* agreed, that the next in remainder after Henry and George might enter on the Crown." The report of the principal case in 1 Keb. 405. is as the MS.

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male of his body; and he grants the land, so long as J. S. hath *issue* of his body; I hold this grant to be void.

And our case is the same in effect; for the King had an estate in possession, only so long as Henry and George had *issue male;* and he grants the land, as in possession, so long as Henry and George had *issue*, be it male or female. Such a grant I hold to be void; for the King is deceived in his grant: He grants what he cannot in that manner grant, as he intends it; he took upon him to grant a greater estate than he had to grant; for it is a greater estate to have the lands so long as J. S. hath issue of his body, than so long as he hath issue male of his body; and it is a prejudice to a third person, and to him in remainder, as to his action.

But it hath been objected, though the King cannot grant one *continued* estate in possession, so long as Henry and George have issue of their bodies; yet, having several estates in fee in him, he may do it by fractions. The patentees may have it whilst Henry and George had issue male; and when these fail then those males who were in remainder may enter; and when these are spent, then the patentees may have it again, whilst Henry and George have issue; and so all may stand, being construed respectively, well enough together, as it would do in the case of a common person; for it differs from Alton Wood's case, where the King, being tenant in tail, with remainder in fee to his own right heirs, grants to Walsh in fee.

The King had an estate tail in possession, and could not grant a fee out of it without a tort; and it would be a tort if such a grant were made by a common person. But here the King hath a fee, and grants a fee out of it; and admit it to be greater than he intended, it is no tort, and so good.

To this purpose Englefield's case hath been cited at the bar: —"The King being tenant for another man's life, without reciting his estate grants for forty years: this is good, though he could not contract absolutely; for the King doth no tort to any." But to this I answer, first, that in Englefield's case it is expressly agreed that it was but a lease for forty years of the land; and so a less estate than the King had, and so the King not deceived in his grant. And so if a copyholder for life have licence to lease for twenty-one years if he so long live, if he lease for twenty-one years absolute, yet this is good; for in law it was but a lease for twenty-one years, if he live so long; and forty years is but such a term as a man's life may commonly arrive to. It is in law counted *a chattel interest.* (*l*)

7 Co. 79.

If copyholder for life have a licence to lease for 21 years, if he so long live, and lease for 21 years absolute, it is good.

Forty years is but such a term as a man's life may commonly arrive at.

(*l*) The words "a chattel interest" are supplied to a blank in the manuscript. This part of the case seems to be confusedly reported by Keble.

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If the King having but for twenty years grant for forty years it is void. If the King granted for one thousand years, or such other long term as would be a mortmain, it is a void grant.

But suppose the King granted for one thousand years, or such other long term as amounted to a mortmain; or having but for twenty years grants for forty years; I conceive, in both these cases, the grant is void, though there is no tortious estate by such a grant; for the King is deceived in his grant.

So the Lord Chandos's case, 6 Co. 55., was urged. Tenant in tail, reversion to the King. The King, reciting the letters patent to the entail, and that the tenant in tail had surrendered them in Chancery, ad opus Regis cancelland., virtute cujus they were cancelled,—virtute cujus the King was and still is seised in dominio suo ut feodo,—the King grants to the said ——— and his heirs manerium prædictum, whereby he passed the reversion only, whereas he intended to pass it in his demesne as of fee; and yet adjudged good; for the King granted less than he intended, and his estate would support such a grant in fee; and in case of a common person such a grant would be good; and so in the present case.

But that case of my Lord Chandos clearly differs in reason from our case, for there "less passed than the King intended; for he intended to part with the possession, and no prejudice to the King." In our case he passed more than he intended; for he intended to part with an estate in possession so long as Henry or George had issue of their bodies, which he cannot pass by reason of the intervention of several other estates. And it is expressly there said, that "if more pass than the King intended to pass, as if he intended only to pass a reversion, and a possession pass, it shall be void." And that is our case; for the letter of the habendum carries it in possession immediately after the failure of issue male of Henry and George, so long as they have issue female; whereas it is but a remainder which the King had in such case.

6 Co. 56 b.

Grant to a terretenant and to a stranger distinguished.

Secondly, that case in itself was but dura lex, and an extrajudicial opinion; and the grant was made to the terretenant who had the immediate estate. But if the King had granted the land by those words to a stranger, supposing the estate tail surrendered, whereas the estate tail was in esse, for my own part I should think the grant had been void; for it gave colour to oust the tenant in tail.

But, thirdly, that was a good grant according to the letter, without any fractions. The grant was of the reversion entirely: but in our case, if it be good, it must be good by fractions, or not at all.

There may be fractions in estates; and the estates in fractions may be granted.

So that there appears a manifest diversity in the cases.

But as touching fractions in estates. The King grants where he hath several qualified fees. I do not deny but that there may, in some respects, be fractions in estates; and those estates so

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in fractions may be granted. Hussey's case, before cited, was, tenant in tail, with the reversion or remainder to the King, forfeits it, or grants it to the King by a conveyance which binds his issue. Though it be agreed that the King there hath one consolidated fee; yet it is also expressly agreed that if the King had two fees in him, that by a grant to one and his heirs by one entire grant, both the estates would have passed.

1 Co. 49. 3 Cr. 319.

The King, in our principal case, had three estates, which were all fee simple in him, though two of them were but qualified, one to him and his heirs whilst Henry or George had issue male; a second, after other remainders interposed, whilst William had issue of his body; a third, after other remainders, absolutely to the King in fee. If the King had granted the land to Duke Brooke, habendum to him and his heirs, I conceive, for my own opinion, all three had passed, (though I confess my brother Tyrrell very strongly argued against it) for the King needed not to recite either his own, or other men's estates, they being created by a subject, and not of necessity tied to be of record, as the King's own grants or leases were. And there the King makes no fractions in his own estates, but such fractions as were whilst the estate was in the King; and so he passeth them as they were in him.

The King need not recite his own or other men's estates, in making a new grant.

If the King had recited, and so passed, all his estate, he could have passed them with no other limitations but to the patentee and his heirs; and therefore, no recital being necessary, the same limitation to the patentee and his heirs will pass; and therefore, I think, the King by a grant to D. B. and his heirs, without any recital, had passed all his estates.

But that differs from our case; for the King intended to grant all which he had, which he does not here; and the words there, *habendum to him and his heirs*, are the words of the largest extent that may be—they are not cut short nor abridged in that case by the King's grant (which is as large as may be) but by the act of law, because the King had no greater estate to grant: and I conceive the patentee hath not by such a grant one entire fee, but three several fees as the King had. And this was the opinion of those who drew this patent; for the King grants his reversion in fee by a distinct habendum; and if the patentee die seised, and after the first fee determines for default of heirs males of the bodies of Henry and George, and the heir male in remainder enter; and after, these remainders being spent, the heir of the patentee, in respect of the other estate, so long as there is issue of the body of William Lord Cobham, re-enters, it may be a question, whether the wife of the patentee shall be endowed, or no; the estate

Where a husband was *actually* seised in fee simple qualified under a grant of the Crown, with remainder to strangers in tail, remainder to the husband and his

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in fee, whereof her husband was actually seised, being determined.

But when the King hath a fee, *so long as J. S. hath issue male of his body;* and he grants the lands, not generally *habendum to A. and his heirs, but habendum to A. and his heirs so long as J. S. hath issue of his body* (which is in effect our principal case) the restraint of the estate is in the very grant itself; and though it is a good grant in case of a common person who hath lands so long as J. S. hath issue male of his body, and grants so long as J. S. hath issue of his body, because it shall be taken strongest against the grantor; yet in the case of the King it shall be void, as I conceive; for the King's grant shall be taken in the usual and common sense, and intelligence secundum intentionem domini regis, and not in deceptionem domini regis. The King, he intended not to pass all his estate as in the other case, for he reserves part of it: but he intended to pass one entire estate, and that in possession so long as Henry and George had issues of their bodies, which intention cannot stand with the nature of his estate.

heirs for another qualified fee simple estate; and dying so seised, the first fee determines, and the strangers enter, and that remainder to them being spent, the heir of the husband enters in respect of the second qualified fee, query, if the widow shall be endowed; the estate whereof her husband was *actually* seised being determined.

The King's grant shall be taken in the usual and common sense, secundum intentionem regis; and not in deceptionem regis.

Cro. Jac. 34.

[Hil. 1 Jac. B. R., Mason and Chambers' case: the King was seised of a rectory, part in possession, part in reversion; and he leases, habendum from Michaelmas next, si nulla dimissio de rectoria was then in being; and if there were aliqua dimissio, then from the end of it. The King intended one entire commencement of the lease, and not at several times; and therefore adjudged void to have it commence at several times, part at one time, part at another.]

Yelverton 42, 48.

I conceive the principal case of Alton Wood to be, in the reason of it, our very case.—Tenant in tail, to him and the heirs males of his body, with reversion to him in fee, makes a grant in tail to Walsh. It was urged that the King might grant an estate during his own life out of his estate tail, and he might grant an estate tail out of his reversion in fee; that, therefore, the King's grant shall be taken by fractions, and to pass that which the King could pass: but it was adjudged to be void for the whole.

6 Co. 56.

One reason of that judgment is given in the Lord Chandos's case, fol. 56. "that the King was not conusant or rightly informed of his estate:" but that reason holds not, for it is both agreed in Alton Wood's case, fol. 51, and in Needler and Needham's case, Hob. 224, that "though the King had recited

his divided estates, it could not have bettered his grant; and yet there he had taken knowledge of the fact, and had only misconceived the law, that his grant might nevertheless work entirely." But the true reason of that judgment in Alton Wood's case is expressed in the Lord Chandos' case, "that the grant could not take effect without fraction of estates, or wrong done." And in Needler and Needham's case the reason of the judgment in Alton Wood's case is set down to be this:—"Because the King did err in the form and manner of the estate, intending that entire which could not be so."

Which reasons are in effect both one, and extended to our principal case. The King intended an entire estate, without fractions, so long as Henry and George had issue of their bodies, which cannot be; for when issue male fail, then other estates in remainder intervene; and those being spent, then it must rise again, whilst Henry and George have issue of their bodies; or else it were a wrong to those in the remainders. For that which was objected to make a difference between that case and ours, that there it would be a tort if such a grant were by a common person; as if a common person, being tenant in tail with reversion to him, grant the land in tail, it were a discontinuance: but here if a common person having two base fees, as in our case, grant the land *quamdiu any issue of Henry or George lived*, it would pass all he had without a tort.—I answer, first, that the reason of that judgment is built upon another foundation. But, secondly, it is true, if a common person, being tenant in tail with reversion over to him, grant in tail, and make livery, the livery, not the grant, works the wrong. But if he had by lease and release, or bargain and sale, granted the land in tail, it had passed the estate for life, and his reversion in fee: and so would the King's patent pass both, without any discontinuance, if there were nothing else in the case.

But we will weigh the reasons of that case, as they are in the printed report of it, with our case.

One reason there was:—"the King intended to grant that which he could not lawfully grant, that was an estate tail in possession, and therefore was deceived; and since that which he intended to pass could not take effect, that which he intended not shall not pass, that is, an estate tail out of the reversion: and the King ought to be so informed that his purpose and intent might take effect." The case is there put,— "the King is tenant in tail, with a reversion to him in fee; the King grants an estate for his own life, and after grants the re-

1 Co. 50. b.

1 Co. 52. a.
1 Co. 50. a.

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version in fee, or in tail. This grant shall be void; for he intended an immediate reversion, and not a reversion expectant upon his estate tail, which was remote and mediate." In our principal case, the King intended to grant one entire estate, so long as Henry and George had issue of their bodies, [that was one estate in possession, determinable upon that limitation;] such an estate he could not grant, for other estates intervened; and, therefore, it shall not be taken by fractions, to pass so long as they had heirs males of their bodies, and immediately after other estates determined to pass it again so long as they had issue of their bodies. Secondly, In that case it was said, "the estate which the King had would not permit such an

1 Co. 49. b. estate as he granted to Walsh; it could not stand with his estate." No more will it in this case: the King hath no such estate as will stand with this limitation; he hath no estate, *so long as Henry and George had* ISSUE *of their bodies.* But he had an estate, *so long as they had* ISSUE MALE *of their bodies.* Thirdly, "The King was not apprised of his own estate; for then he would not have granted an estate which could not take

1 Co. 51. b. effect according to his purpose; which reason holds clearly in our case. Fourthly, It was said "the King intended to grant an *entire* estate, not two several estates; and to grant

1 Co. 52. b. an estate in possession and not part in reversion:" which reason fully holds in our case. It was said in that case,

1 Co. 52. b. "it were an absurdity to have such fractions of estates that Walsh should have it to him and the heirs males of his body during the King's life, and then the King should have an estate tail, and then the patentee should have an estate tail expectant upon the King's estate tail, whereas the King intended to grant an estate tail in possession; *et talis interpretatio semper fienda est ut evitetur absurdum.*" And Popham said, "Without ques-

1 Co. 50 b. tion, it shall not pass by such fractions of estates."

The same reason, I conceive, holds in our principal case: here would be fractions of estates. Upon this one entire habendum the patentee should have it so long as Henry and George had issue of their bodies; and then, when those failed, the King should have it again so long as William had issue of his body, which without all question was not intended.

I have pressed this case of Alton Wood's the more, because it was at first adjudged upon solemn debate and deliberation. And in that case it was adjudged void for the entire part; so it shall be in this case; and not good so long as there was issue male of the body of Henry and George. It is very true, if it were good so long as there was issue male of the bodies of Henry and George, though void for the residue, yet the pa-

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tentee being then a good tenant to the freehold, it would be sufficient to enable the recovery wherein Duke Brooke was vouched, and so bar the lessor of the plaintiff in this action. But this title is now determined by the failure of issue male, and the ejectment lease is also determined in point of time. But the defendant would be nothing the better for it; for the estate in tail male being determined, the other estate which the King had, so long as Henry and George had issue, not passing by that patent, comes to take place. So that the King, or whosoever hath gotten his title, will have it (as I have argued) against both plaintiff or defendant. But I hold, as I said before, if the patent cannot extend by fractions, to pass as well the estate which the King had so long as Henry or George had *issue*, as that which he had so long as Henry or George had *issue male*, it shall be void for the whole.

I have done with this point. But my brother Brown starts up another point which was never touched at the bar. Saith he,—admit the habendum be void, the King by the premises in the first clause grants it to Duke Brooke and his heirs, by a second clause to him and his heirs *adeo plene, libere, et integre, prout by the attainder of Henry and George, or either of them, aut quocumque alio legali modo seu jure in manus nostras devenerunt.* So that these premises are sufficient to pass all; and here is an express grant; and so the habendum cannot alter it; and a void habendum shall not vitiate the grant; and he cites Auditor King's case cited 8 Co. 112. in the Earl of Rutland's case,—"the King granted lands to B. and his heirs, habendum to B. and his assigns; and it was resolved the habendum was void, and the grant good;" and some other cases he cited to shew the force of an *adeo plene.*

Construction of habendums.

To this I answer, first, I conceive in the case of a common person, if he grant lands in the premises to B. and his heirs, habendum to B. and his heirs so long as J. S. hath issue male of his body, I conceive this is a good habendum, and a qualified fee; it stands agreeable with the premises. But if he had granted to him and his heirs, habendum to B. for life or years, this is a void habendum, because it is repugnant to the estate in the premises. And so is Baldwyn's case; and this answers Auditor King's case, where the habendum was to him and his assigns, which was but for life, by implication. And, secondly, this habendum in the case of a common person would have been good so long as Henry and George had issue. It is void in the King's case, jure regis, because the King is deceived in his grant, and contrary to the King's intention, which must be gathered not out of this or that part of the patent, but out of

2 Co. 23.

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the whole. The King intended, indeed, to grant to Duke Brooke *and his heirs:* [so say the premises] but the habendum sheweth *how* to him and his heirs, *viz.* so long as he hath *issue of his body;* wherein the King was deceived, thinking he had an *entire* estate to grant *so long as Henry and George had issue,* which he had not. So that which makes void the habendum makes void the whole grant, because the King was deceived; and such an estate passed not as he intended. In the case of a common person the estate shall be taken strongest against the grantor; so that if the premises express an estate, the habendum, though void, shall not alter it. But that reason turns in the King's case; for the grant shall be taken strongest for the King, according to his intention; and the proper office of the habendum being to limit the estate, as of the premises to express the grantor, and grantee, and thing to be granted, if the habendum be void, whereby the King is deceived in the restraint he intended to make, the patent is void, as I conceive. But in Auditor King's case there was no express estate in the habendum, but to him and his assigns; and if there had been any express estate for life, it was unsuitable to the nature of the premises, and was not of an explanation of the premises as our habendum is; though in that case, if the habendum had been to him and his heirs for the life of J. S., it might have been a question. If land be given to J. S. and his heirs, habendum to him and the heirs of his body; or to J. S. and the heirs of his body, habendum to him and his heirs; the books say he hath an estate tail, and remainder expectant. But in the case of the King, if he gives land to J. S. and his heirs, habendum to him and the heirs of his body, I conceive in such a case he hath but one estate, *viz.* that in the habendum to him and the heirs of his body; for the King intended not two several estates.

Distinction between the King's grant, and the grant of a common person.

2 Co. 54.

C. C. 21.

So if the King grant land by the premises to J. S. and his heirs, habendum from Michaelmas next, I conceive this is void in the King's grant; for it appears the King intended to keep it till Michaelmas, which if the habendum be void, and the premises good, he cannot. And, therefore, I conceive in the case of the King, his whole intent shall be considered through the patent, where the habendum is pursuant to the premises, and the general intent thereof, though not agreeable to law. But where the premises shew one intent, and the habendum another, there it shall be taken best *ut res valeat.* If it be allowed me in this case, that where the King grants in the premises to one and his heirs, he may restrain it by an habendum to him and his heirs, *so long as J. S. hath issue of his body,* it

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will follow, that if this limitation be void in the King's case, the whole shall be void; for he is deceived in the restraint which he intended to make.

I have one thing more to say to this point; that is, there are two habendums in this case; the one is for the base fees, the other for the absolute fees. Admitting the first habendum be void, yet the second habendum for the reversion in fee simple, which the King had as a distinct estate, stands good: and that is sufficient to answer the premises by which the lands are granted to Duke Brooke and his heirs. So that admit the other habendum void, yet it is not like the cases put by my brother Brown, where, if the habendum be void, all is void. [In Pasmore and Prowse, cited in Lofield's case, one, having a reversion expectant on an estate for life, grants the lands, habendum the reversion for life, or habendum the reversion cum acciderit; in both cases it is good. So here the King grants the manors to Duke Brooke and his heirs, habendum the King's reversion in fee simple, which was forfeited by the attainder of Henry, Lord Cobham; this is good, and sufficient of itself to answer the limitation to Duke Brooke and his heirs in the premises.] And this I conceive answers my brother Brown's objection, if there were nothing more in the case.

As to the clause of *adeo plene*.

As for the *adeo plene*, I conceive that alters not the case at all: the use of that hath always been expounded to extend to the thing granted, and not to the estate, which is proper to be limited in the habendum; and, therefore, the cases cited out of Whistler's case are good law. By the grant of a manor *adeo plene* and the advowson passeth. But if the King has granted a manor to J. S., *adeo plene* as J. D. had it, no estate would have passed in the case of the King: and it is well observed in Whistler's case, the clause of *adeo plene* never came in the first part of the grant; and, as my brother Tyrrell said, if this clause intended to limit that estate which should pass, the first clause and habendum should be nugatory.

10 Co. 63.

So that, notwithstanding these objections, I conceive that if the habendum be void (as I have argued) that neither the fee simple which the King had whilst Henry or George have issue male of their bodies, nor that which they have whilst William had issue of his body, do pass.

If the King's grant, as I have thus argued, should not be good, then, when the recovery was suffered, wherein Duke Brooke was vouched, the freehold was in the King; and so no good recovery to bar the lessor Sir John Brooke, Lord Cobham, of his remainder. But, admitting the grant to be good, it is then considerable upon this habendum what passes by it. And that is the next point which hath been spoken to,—Whether

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Reversion in the King after estates of freehold in a common person preserves all estates and remainders subsequent to the King's reversion from being barred by a recovery by that common person.

any more than an estate of freehold pass; for if no more than a freehold pass, so long as there is issue, or issue of issue, then it leaves the reversion and inheritance in the King; which reversion, notwithstanding any common recovery, preserves all the estates and remainders subsequent to the King's estate; and then also the recovery by Duke Brooke would be a forfeiture, and determine his estate. Wherein the point is but this:

The grant is habendum "to Duke Brooke and his heirs, quamdiu Henricus, nuper Dominus Cobham, aut aliquis exitus de corpore suo procreandus, aut aliquis exitus de corpore præfati Georgii Brooke procreat., vel procreand., hæreditabilis præmissorum virtute ultimæ voluntatis Georgii, nuper Domini Cobham, vixerit, vel in vitâ existet, vel eorum aliquis vixerit, vel in vitâ existet:" whether this pass an inheritance, or only a descendible freehold. In the like patent to Charles Brooke, which was the brother of Duke, made by King James, to avoid this question there are other words added to these before, *viz. aut aliquis hæres, aut exitus, aut aliqui hæredes, aut exitus de corpore* hujusmodi hæredum, vel exitus legitimè procreat. vel procreand. hæreditabilis, &c. But (*m*) I do not take that to be the question, because there wants the words "hæredes" in the habendum; for though the words "*issues*" are not words proper to limit an estate of inheritance, yet they may be sufficient to limit and determine the duration of an estate of inheritance. As if lands be given to J. S. and his heirs, so long as such a tree grows, it is an estate of inheritance; and so to give land to one and his heirs, so long as J. hath issue, I conceive is a good estate of inheritance, determinable by default of issue. Otherwise it were, if it were limited so long as he hath sons; for the word *issue* is nomen collectivum, and comprehends omnes qui exeunt de corpore, et natos natorum, et qui nascentur ab illis, as well the mediate as the immediate issue; and so in a reasonable sense upon a limitation *so long as J. S. hath issue*, it shall be intended to extend to all the issues and descendants, mediate or immediate.

Issues.

C. C. 29 b. 1 Co. 103.

The word *issue* is nomen collectivum, and comprehends *omnes qui exeunt de corpore*, as well the mediate as the immediate issue.

But the word *issues* may be referred to the immediate issues only.

But the word *issues* may also be referred to the *immediate* issues only; and then, if the sense be so, it shall not be extended further, and shall be all one as if it had been limited to him and his heirs so long as J. S. hath sons or daughters: this

(*m*) Marginal note in the MS. "Serjeant Maynard objected that the grant was not quamdiu any issue should be inheritable, but quamdiu any issue inheritable should live. And so, he saith, there may be a time when the words shall hold, and the estate not be in being; and another time when the estate shall be in being, not the words."

carries only a descendible freehold. Now the objection here is, when it is limited *quamdiu any issue of Henry or George shall live*, this would have carried it to all the succeeding generations. But when it goes further, *or any issue or any issues of the body of such issue*, this (as is objected) shews that, in the first place, the *immediate issues* only were intended, and not *all issues* whatsoever, for otherwise the first words were nugatory; and by the same reason that the word *issues* shall be construed to extend only to the immediate issues in the first place, they shall also be construed to extend only to the immediate issue of those issues; and then it is no more than *habendum so long as Henry and George shall have children, and those children shall have children.* This goes no further than the third generation, and is but a freehold descendible.

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But as to this point, I conceive, a good estate of inheritance passeth; for, first, as I said before, *quamdiu aliquis exitus* would have carried an estate of inheritance; and then I think the latter words, *aut aliquis exitus hujusmodi exitus*, are but words of explanation, or redundance, as in Shelley's case, 1 Co. 104., there is a limitation *to the use of Edward Shelley for life*, and after to the use of the *heirs males of the body of Edward*, and *of the heirs males of the bodies of such heirs males.* *Heirs males of the body* may as well be words of purchase as of limitation; yet the latter words there shall not alter the limitation before; they are but exegetical and explanatory of the other, and so in this case.

Heirs males of the body may as well be words of purchase as of limitation.

But admitting the words shall extend only to the immediate issue, it follows not that the latter words of *the issue of the issue* shall extend only to the immediate issue of the immediate issue, but rather the contrary; for the first limitation, so long as there was issue of Henry and George, extended only to the immediate and not mediate issue, for no other reason but because there was a subsequent limitation to the issue of that immediate issue: but there being no further limitation after the limitation to the issue of the issue, by the same reason that the first words would have extended to all the issues, mediate or immediate, had there not been a limitation over, by the same reason, I say, the latter words which have no such limitation over shall also extend to the issues mediate or immediate, as the first should have done. And it is no more than if the lands had been given to Duke Brooke and his heirs, *so long as Henry or George had children, and that those children had any issues*, which limitation would comprehend all both mediate and immediate issues; and so it shall in our principal case.

Then, as I conceive, the last thing considerable upon this

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habendum is this:—the King grants to Duke Brooke and his heirs *quamdiu there was aliquis exitus of Henry and George;* which, admit it is a good grant, and issues out of both estates forfeited to the King, *viz.* that to the heirs males of the body (which it takes up wholly) and that to the heirs of the body of William, yet it leaves part of this latter estate (*viz.* for default of issue of Henry and George, so long as William had several daughters, and issue of his body,) in the King: whether this estate shall hinder the operation of the recovery wherein Duke Brooke, the patentee, was vouched, and prevent the docking of the remainder to the Lord Cobham: and I hold the recovery shall bar it. This rather needs explanation than arguing.

The case as to that is this:—Duke Brooke hath a fee simple qualified by the King's grant, with remainder to Duke Brooke himself and the heirs males of his body, remainder to Sir John Brooke Lord Cobham the lessor, remainder to the King so long as William hath heir of his body. I will put it stronger; for in truth Duke Brooke had part of that estate so long as William had heir of his body; and the King but the other part, with remainder over. Duke Brooke bargains and sells, and then comes in as vouchee in a common recovery: this bars Duke's remainder in tail, and the Lord Cobham's remainder in tail; but does not bar the King's estate, nor the estate subsequent to it.

If the King had made a gift in tail, remainder in tail, before the statute of 34 H. 8. c. 20., a common recovery would have barred both the estates; 2 Co. 52., Sir Hugh Cholmeley's case, Warren's remainder was barred in such case. 2 Co. 16., Wiseman's case, Com. 555. 29 H. 8. 32. (*n*) C. C. 372. 1 Cr. 430. Stone and Newman's case. And at this day it will in case where the particular estates are made by a common person, though it touches not the King's remainder, or estate, yet it shall touch those which preceded it; for by the same reason that it may bar the issues, it may bar the remainder, and the recompence shall go unto them. In our case the remainders were made by George Lord Cobham, and therefore

If the King had made a gift in tail, remainder in tail, before 34 H. 8. c. 20., a common recovery would have barred both the estates. So at this day it will where the particular estates are made by a common person. Though it touches not the King's remainder, or estate; yet it shall touch those which produced it.

(*n*) 29 H. 8. 32. In the margin of the edition of Dyer, published since the time of Sir Orlando Bridgman, is the following case: "Hil. 5 Car. in Chancery between Lord Nottingham and Lord Monson, it was resolved that if tenant in tail, donee of the King, levy a fine, and suffer a recovery, the estate tail is not barred, for the statute of 34H. 8. saves it. Otherwise, if the King for money makes a gift in tail; by Coventry, Hide, and Richardson."

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shall be barred: but the estates subsequent to the King's estate shall be protected by it; for the recompence being but a feigned recompence, shall not bar the King: and so a stop being made there it cannot go to the remainders subsequent to it; but the Lord Cobham's estate in the principal case being precedent to the King's remainder, and subsequent to Duke Brooke's remainder, if there be a good tenant to the freehold, Duke Brooke, coming in as vouchee, shall bar the Lord Cobham whose estate is subsequent to him, agreeable to Copledike's case, M. 3 Co. 6., and the cases there put.

So that I conclude, the patent, notwithstanding all the objections against it, is good enough, save only for that point upon the habendum, where the King, having an estate so long as Henry and George had *issue male*, grants so long as Henry and George have *issue of their bodies*, for which cause only I think the patent to be void (*o*).

But then, admitting the patent should be void, there are two things more stirred in the case against the plaintiff's title.

The one is this,—the King was entitled by double matter of record, the attainder of Henry Lord Cobham, and the office, whereby it was found, that Henry Lord Cobham was seised to him and the heirs of his body. (And thereupon it is urged, that he in remainder cannot enter upon the King, or his patentee; for by the common law, where the King was entitled by double matter of record, as the attainder and office, the party could not enter, but he was put to his petition; and thereupon he was to have an office found for him, setting forth his title; and then he was to have his traverse, or *monstruns de droit*, as the case required. And this held as well in the case of the King's grantee, as of himself; for in such case a *scire facias* ought to be awarded against the patentee, as st. 73 b. is. And the statute 2 E. 6. c. 8., which is the only statute which reaches the King, when he is entitled by double matter of record, gives a traverse, or *monstrans de droit*, as the case requires; and gives not an entry to the party.) And the stat. 34 H. 8. c. 20., though it enact that the King shall be in actual possession without office, of that which the party attainted had, yet it alters not the strength of an office where one is found, nor gives more power to enter upon the King, or his patentee, than they had before; so that it remains at the common law. This

All this may be omitted.(p)

4 Co. 57.

But if it were needful, the special act of confirmation preserves the right of entry to those in remainder by express words. 4 M. 139. (*q*) The Duke of Northumberland's case was after 2 E. 6.

(*o*) On this point Hyde, J. 1 Keb. 403., and Brown, J. ib. 397., agreed against Bridgman, C. J.

(*p*) This marginal note has reference to the passage between brackets; it has been preserved as explanatory of the manner in which the Chief Justice seems to have left his compositions.

(*q*) This reference seems to be to Dyer 139. 3 and 4 Ph. and M.

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point was waived by some of the defendant's counsel, but insisted on by others: and to me, as the case hath been put, it seems to be of great difficulty.

If there be an attainder, and an office found, that the person attainted was seised in fee, though this be false, he that had right cannot enter upon the King, or upon his patentee. 4 Co. 55. 4 Co. 59. St. 75. At the common law, if an office found the title of the King to a freehold, the party had no remedy by traverse, or monstrans de droit.

It is clear, if there be an attainder, and an office found, that the person attainted was seised in fee, though in truth it was false, he that had right cannot enter upon the King, or his patentee; for the record of the office which is the King's title, stands in force. But if the office find that the person attainted was seised to him and the heirs of his body (as our case is) now the King's title by the office lasts no longer than whilst the person attainted had heir of his body: hereupon there being an estate once vested in the King, which is in truth determined, the great question grows, whether he in the remainder, or who, hath a right, may enter, or was fine to a *monstrans de droit*. At the common law, if an office found the title of the King to a freehold, the party had no remedy by traverse or *monstrans de droit*. But if the title of the party were found in the same office, he might then have his *monstrans de droit;* which implies he could not enter in such case. But in those cases the party might enter upon the King's patentee; as in all cases where, by the common law, he might have a *monstrans de droit*, or traverse against the King, he may enter upon his patentee.

But if the title of the party were found in the same office, he might then have his monstrans de droit. In this case he could not enter on the King: but he might enter on the King's patentee. In all cases where, by the common law, one might have a monstrans de droit, or traverse, against the King, he might enter upon his patentee.

But in our case, though the King's title be found specially by office, yet here is none found for him in the remainder, Sir John Brooke Lord Cobham, the lessor; and besides the King's title found by office was continuing, and did not appear to be defeasible, by the office itself; for it might by possibility last for ever, being to last so long as Henry had heirs of his body. And, therefore, the doubt is, whether the King, being entitled by a matter of record to a determinable estate, *viz.* by the death of Henry without issue, the determination of this estate, whereto the King is entitled by the office, ought not to be found; and if it be requisite to be found before entry of him in the remainder, the finding of it in this verdict will not serve the turn; for that it ought to be found before the entry by John Lord Cobham in remainder, and his lease, whereupon this verdict is found. And besides the finding it upon a verdict, inter alia, (and not by special office) shall not take away the force of an office entitling the King. In Piers Partifield's case, a return of the Mayor of London, though upon the King's writ, shall not determine the King's title by office, though it

29 Ass. 31.
4 Co. 56.

stands with the office, and contradicts it not. In the case of the King, or so long as he had not departed with his whole estate found by the office, I conceive he in the remainder, as Sir John Brooke Lord Cobham, could not enter in this case.

If by office it is found that J. S., who was attainted, was seised of a mortgage, upon condition that if the mortgagor paid *100l.* then to be void, the King is now entitled by double matter of record, the attainder and office: but the office finds an estate determinable. The mortgagor had his remedy by *monstrans de droit*; (*r*) but before that the performance of the condition ought to be found by office.

It ought to be so where land was conveyed to the King, upon condition, by record (quære hîc, the case Co. de Leic.)(*s*) and the performance of the condition appears not of record, 4 Co. 55. Com. 229., a fortiori in case of double matter of record. Suppose the King in such case had granted over all his estate, whether or not the mortgagor before office found (whereby the estate of the King was found to be determined) could enter upon the King's patentee, may be a question; and I know no authority in point.

It is in effect our very case: it is found by office that Henry Lord Cobham, the person attainted, was seised to him and the heirs of his body. The King grants so long as he hath heirs of his body. Now the King hath parted with his whole estate found by the office. If it, or part of it, had continued in the King, I conceive that an office ought to have been found of the death of Henry Lord Cobham without issue, before he in the remainder can enter; for the King having an estate by double matter of record, the determination of it ought to appear also by record. But the King, having granted over his whole estate found by the office, whether he, as the remainder, can enter upon the patentee, or his heir, may be the question; for the title of the patentee is upon a double record of a title under the King; and it may seem reasonable that the determination of that title should also appear upon record. The case was put out of 33 Ass. pl. 10., in Alton Wood's case, 1 C. 48. and 50. The husband of a feme inheritrix was attainted of felony, and an office finding the special matter, "that he was seised only in right of his wife, the heir," says the book, "shall not be put to his petition." And I agree the law to be so; for in that case a *monstrans de droit* lay at the common law, because the same

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(*r*) See Burgess *v.* Wheate, 1 Eden 205. 233. 255.; and other cases in 1 Powell on Mortgages, 5th Ed. p. 309. note H.

(*s*) See p. 221.

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office which found the King's title, found the parties' title; but that case doth not say the heir may enter. And in the principal case there, though it was against the patentee, the heir did not enter, but had his writ; so that I hold it a point very worthy of consideration.

Moor 325. In Englefield's case; contra Lidger's case, 29 El. cited in Moor. An office found by a commission out of the Exchequer, is not an office of entitling, but of instruction, where the King was entitled before; and serve, only to instruct the King's officers of the certainty of the land, that it may be put in charge; and not to create a title in the King. And entry may be against such office of instruction. 5 Co. 52. Page's case.

But I shall deliver no positive opinion in it: inspecto recordo, I find the case to be otherwise than it is put at the bar; for the office was not found upon a writ out of Chancery under the great seal, but by a commission out of the Exchequer; and offices so found are not offices of entitling, but offices of instruction, where the King was entitled before, as he is in our case by the stat. 34 H. 8. and serve only to instruct the King's officers of the certainty of the land, that it may be put in charge, and not to create a title to the King, as it is resolved in Page's case. So that the King not being entitled by this office, is not entitled by double matter of record. And the King's title being in part determined, and none particularly appearing for him upon any entitling record, he in the remainder may lawfully enter, this office of instruction notwithstanding.

Also in the principal case, the office finds only that Henry, Lord Cobham, at the time of his death, was seised to him and the heirs of his body. But it is found that Henry, Lord Cobham, is dead without issue, so that the estate found by office is determined; and, consequently, the entry of him in remainder shall not be hindered by that office, there being no double matter of record against him. That is the reason of Sir William Say's case, 15 Eliz. 325; Gertrude, tenant in tail, with the reversion of a moiety to herself, and of the other moiety to Anne, Marquess of Northampton, as coparcener, is attainted by act of parliament, and all her lands forfeited. The King grants in fee; the tail is spent: the other sister may enter without petition, or *monstrans de droit*.

And so in the Earl of Arundel's case, 17 Eliz. 344,—he grants the manor of Haslebury to Thomas, Earl of Northumberland, in tail, with remainder to Henry his brother, with condition if the Earl of Northumberland should discontinue, or do or suffer any thing quo minus the said manor should revert to the Earl of Arundel and his heirs, sine impedimento vel dilatione in possessione, et id immediate, if the said Earl and Henry died without issue, that it should be lawful to re-enter. It is there agreed (the Earl of Northumberland being outlawed, and attainted of treason, whereby the estates by the statutes 26 H. 8. and 33 H. 8. was in the King without office) that the manor, notwithstanding the attainder, debet et potest reverti to the donor immediately by act of law, by failure of issue, because

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the King's estate was determined. As in the Lord Burleigh's case, when issue male of H. 7. failed, his entry ruled congeable without issue; for in those cases there was only a title by attainder general, and no particular title by office, and so there being no office here (but upon commission out of the Exchequer, which is as no office in law,) or if there had been a good office, yet the estate found by the office being determined, he in the remainder may enter.

As to the confirmation by act of parliament.

The last thing in this case is upon the act of parliament; wherein the point is this:—Henry, Lord Cobham, being seised in tail male, with like remainder to George, his brother, they are attainted, and office found that Henry was seised to him and the heirs of his body. The King grants the land to Duke Brooke, who was next in remainder in tail male after Henry and George. Duke Brooke in April, 3 Jac. bargains and sells to Prescott, and in P. 3 Jac. levies a fine to Prescott, against whom a common recovery was had, with voucher of Duke Brooke, who vouches the common vouchee. Then by act of parliament begun 5 Nov. 3 Jac., but continued by prorogation to 4 Jac., it is enacted that Henry and George, &c. prout, &c.

And I hold this act of parliament helps not the patent, if it were void before; for it enacts only, "that the King's grants shall be good and effectual in law to all intents, constructions, and purposes, according *to the tenor, effect, and true meaning of the letters patent.*" So that it is made good only according to the *tenor of the patent.* The act supplies the defect of power in the King to grant: but it makes it not good, if the patent in the composition of it were not good. That is the very case of 38 H. 6. 38:—the King grants a manor, except the advowson; then he grants the reversion to a certain bishop, *habendum una cum advocatione*, (which is void) *ad effectum*, *that they should grant them to the manors of* ———, this is void, for that the advowson is not named before the habendum; and after the King, by authority of parliament, ratifies and confirms the said letters patent and grant. This extends not to the advowson, nor to take away any condition, if it were in the grant by the words *ad effectum.* But if the King grant one *the lands of Io. Mary of J. S.*, which is a void grant, and after, this grant is confirmed by parliament, this is good; 38 H. 6. 38. by Laicon, and agreed by Prescott, Chief Justice, for the act of parliament supplies the defect of power in the King. And that is all which the act of confirmation supplies here: it makes the grant so good to the patentee, as if this act of parliament had vested the land in the King before.

Com. 399. b.

Com. 397.

The Earl of Leicester's case in effect was, he was indicted at Norwich before eight commissioners, fifteen being in the

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commission. But the commission to the mayor of London and others to try him recites that he was indicted before *all the fifteen*, and gives them power to receive *indictamentum prædictum, et ad audiend., exam., et render; compelland. præd. Robert. Dudley super inde, et debito fine triand., et adjudicand. soit tiel endit. et le mandat. al commrs. fi. a de endictament. prædict.* So that it was held, the trial before the mayor of London was void, for the commission to receive and proceed upon an indictment before *fifteen* is not warranted by an indictment before *eight*. Afterwards by act of parliament, which recites that the Earl of Suffolk, Sir Robert Dudley, &c. were rightly, and according to law, convicted and attainted of treason, as by the records thereof more fully appeareth, the King, Lords, and Commons, grant and assent that the said convictions and attainders shall be approved and confirmed by authority of parliament; and it was further enacted that the said Duke of Suffolk, and the attainted persons above named, should by authority of parliament be convicted, and attainted of high treason; and that so many of them as should be alive should suffer pains of death; and that they should forfeit all their lands, and they should be in the Queen actually without office; and it was adjudged *that the attainder being void, the act of parliament should not make it good.*

Com. 399.

25 E. 3. parl. rot. No. 54, 55.

And a difference is taken where acts of parliament refer to a thing which is, and hath no force or power; there the act is good, and adds force to it. But where it refers to a thing that is not, it is void, and upon that difference Io. de Matraver's case, 29 E. 3. Grants 100. (*t*) Besides, this is a confirmation of all grants in general, not particularly of this patent. And, thirdly, there are two express savings, either of which leave those *in remainder, or reversion* to be in the same condition as if the act had not been made. The first saving preserves the remainders out of the grant of the forfeiture of their lands, and the second saving preserves the remainder out of the clause of making the King's grant good.

And, lastly, though the act should make good the patent, yet there are no words in it to make good the recovery by relation; so that I take it the act of parliament will make nothing to the case.

(*t*) Fitzherbert's Abridgment.

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SAUNDERS *v.* PLUMMER (*a*).

Tr. 14 Car. II. Roll. 1461. (*b*)

[An innkeeper is liable to the *administrator* of an intestate for the loss of the intestate's horse, whilst in his care; there is a contract or assumpsit in law between the innkeeper and the guest; the injury suffered is not a tort only.]

BRIDGMAN, C. J.

Saunders, administrator of Saunders, brought an action of the case against Anne Plummer, a common innkeeper, for negligent keeping the intestate's gelding, whereby he was stolen. Upon an issue that the horse was put to grass at the request of the intestate, it was found for the plaintiff; and it was moved in arrest of judgment, that the action lies not by an executor, the action for this negligence dying with the plaintiff; and it was argued twice of each side at the bar. Harg. MS. No. 56. fol. 120. 1 Co. 142.

I am of opinion that the action will lie; whether by the common law, or by the equity of the statute, 4 E. 3. c. 7. may be considerable: but if by either, it is for the plaintiff.

At the common law an action of trespass, or the like permanent action grounded upon an injury done, or of waste, *moritur cum personâ*; if the person died against whom the injury was committed, his executors could not have the action, as appears expressly by the recital of the statute 4 E. 3. c. 7. Yet in the Statute of Waste, 20 E. 1. the case appears to be, that Gawen Butler brought an action of waste against Walter de Stapleton, for waste done in lands which he held of him for life, and died; William, his brother and heir, brought a new writ; and the defendant pleaded that he ought not to answer him for waste done in the time of his brother. The judges did not agree in giving judgment, because it seemed to some of them that it should not be agreeable to law that any man should obtain advantage and recovery due by writ (which is a writ of trespass done to a person certain) but only the same person to whom, and in whose time, the trespass was done; other justices, with the more part of the King's counsel, were in the contrary opinion, alleging that the said William ought to be heard and answered unto, and all others, whatsoever they

At the common law, an action of trespass, or the like personal action on an injury, or waste died with the person injured.

(*a*) "No report of this case in print." F.H.

(*b*) The roll of this year is not yet placed in its proper niche, after the removal of the records in Westminster Hall.

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be, in like cases, or in like trespass; and because like matters have remained not amended, and trespasses unpunished, which was inconvenient, wherefore the King in his full parliament, by a general council, hath ordained, and from henceforth commanded to be strictly observed, that every heir shall have his recovery by writ of waste in the aforesaid case. And it is commanded to Gilbert Thornton and his companions, assigned to hear the King's pleas, that they proceed in the aforesaid matter, and in other like from henceforth. And judgment shall be given according as the matter is found.

Survivorship of actions in such personal torts enforced by the stat. of 20 E. 1. of Waste. But the law taken to the contrary, since that time.

It seems by this statute there were diversity of opinions, whether in such personal torts the action survived or not; and that statute seems to enforce that they should survive. But the law hath been taken to the contrary since that time. In that very case of waste, the heir cannot bring his action of waste for what was done in his ancestor's time.

F. N. B. 59. C. M. ch. 51. (*c*). Marl. 29.

A bishop, master of an hospital, a parson shall not punish what was done in the time of his predecessor; a fortiori, not an heir. And that stat. 20 E. 1. hath been held rather to be as an ordinance, (*d*) than a statute; or at least as a direction to the judges, which in other cases did not bind, if the law in truth were contrary. It was against the reason of law, that the heir should have damages, which if due to the testator, ought to go to the executor. And the reason of that direction was a mistake; for in trespass, quod clausum fregit, et arbores succedit, which trenches to the prejudice of his inheritance; pulling down his house, or the like, the law is clear. If he, in whose time the offence was committed, die, no action will lie at this day. It was so at the common law for an injury done to my goods: if a man took away my horse, and I died, my executor could not bring an action of trespass; for in that he was fineable, and liable to imprisonment. But if the horse were alive, the executor might bring a replevin, and recover damages for all the time from the taking him, or a writ of detainer (*f*).

Mistake vitiates a precedent.

In trespass, quod clausum fregit, &c. the law is clear: if he in whose time the offence was committed die, no action will lie at this day.

34 E. 3. Avowry, 257. (*e*). 17 E. 3. Ex. 106. (*e*). 18 E. 3. Replevin, 24. (*e*).

(*c*) Query, 2 Inst. 151.

(*d*) In 1 Roll. Ab. 825. tit. Waste, O. pl. 9. this is called an ordinance, and is said to have been repealed.

(*e*) Fitzherbert's Abridgment.

(*f*) "If a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor." Hambly *v.* Trott, Cowper 375. And see that case for the general subject of the text.

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The common law was so strict in this point, that in some other personal actions, where the debt, or damage, or duty, was not certain, they would not allow an action to survive; and therefore an executor could not bring an action of account for an account to be made to the testator, before the Statute of Westminster 2. c. 23.

An executor may bring an action on the case, on a promise in law to pay money. 9 Co. 89. a. Pinthon's case.

But where the debt or the duty, which was the ground of the action, was certain, though it sounded in damages only, which are uncertain, the executor might bring his action; and, therefore, in an action of the case upon a promise in law to pay money (though, I confess, such actions are of a later invention) the executor may bring an action. So if it were upon an assumpsit in fact, and a collateral promise; for it hath been adjudged the action will lie against the executor. *A fortiori* for an executor by the common law, for they are out of the stat. of 4 E. 3.

4 Co. 92. Slade's case. Hobart 216.

9 Co. 89. Pinthon's case. 8 Co. 69. Caly's case.

But this action here, in the principal case, is not merely in nature of an action of trespass, founded upon a tort, though it be called trespass upon the case. So neither is it grounded merely upon a contract; for it is mixed with negligence and special prejudice, by his not keeping the horse of his guest, with which he was intrusted; and, therefore, it is more doubtful whether the executor had any remedy at the common law; because, though the action had something of crime or fault, the action is *per defectum bonæ custodiæ*; yet the rule or ground of it was upon a contract in law between the innkeeper and him. Or whether the executor shall be aided only by the equity of the stat. 4 E. 3. c. 7. I shall not determine; but take the advantage of both. For I conceive it lies not by the common law in this case. This action lies here for the executor by the equity of the (g) stat. 4 E. 3. c. 7.; the words whereof are, "Whereas in times past executors have not had actions for a trespass done to their testator, as of the goods and chattels of the same testator's carried away in their life; and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers, and reckon their damages in like manner as they whose executors they be should have had if they were in life."

I observe the letter of the act is not for trespasses "de bonis et catallis asportatis," but for trespasses "*ul de* bonis et catallis asportatis;" so that the trespass de bonis et catallis is but one instance of the trespasses for which an executor

(g) "This statute is a remedial law, which has always been taken by equity." Lord Raym. 974. and see Selwyn, N. P. 744. 4th ed.

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may bring his action; but such an instance as seems to restrain it, though not to those trespasses only, yet to trespasses of a like nature; and not to trespasses merely personal as battery, or slander, or which trench to the inheritance, and so properly concern not the executor, as trespass quod clausum fregit, arbores succidit, or the like. And yet the word "*bona*" in such case will help or abet for trees cut down, by the statute of Marlbridge 29, but with this difference, the statute (the instance de bonis asportatis being but similitudinary) hath been construed favourably, according to equity; or rather rendered according to the extent of the letter; for acts that give remedies for wrongs done shall be taken largely. So a quare impedit lies by an executor for a disturbance in the life of the testator; and yet neither a ward nor a prochein avoidance can be properly said *bona et catalla asportata*. And as the words *bona et catalla* have been extended largely, so also the word *trespass*. It hath been extended to actions in the case in general; as in Russell's case, to trover and conversion; to an action brought by an executor for trover and conversion in the life of the testator; and was also so adjudged Trin. 11 Jac. B. R. Jerome and Best's case. So as to ejectio firmæ, which is trespass and more, for the land shall be recovered; an executor shall have an action of trespass and ejectment for an ejectment in the life of the testator.

C. M. ch. 152. 9 E. 4. Executors 52. (*h*) 11 H. 4. 59. (*i*) Acts that give remedies for wrongs done to be taken largely. 3 Cr. 207. M. 32, 33. C.B. Eliz. Smallwood *et* Sale *versus l'Eveseque de* Litchfield. G. 97. 7 H. 4. c. 6. 8 Co. 32. Caly.

So here in the plaintiff's case the intestate had a ground of action by reason of his goods, *viz.* the horse taken away, though not by the defendant, yet by his default per defectum hosp. tutoris aut servientium suorum; by negligent garder as the writ runs; or rather in this case (which I desire to be observed as bringing it nearer to the letter of 4 E. 3.) by the act of the hostler. For if the horse had been stolen out of the stable, it had been pro defectu: but it is found here to be by means of the act of the hostler or innkeeper, by putting the horse to grass extra hospitium, without the request of the owner.

But for my own opinion, I rather think this action will lie by the executor at the common law; and needs not the aid of the statute 4 E. 3. For where the action is grounded upon a contract, or quasi contract in law or fact, I conceive the interest of the action will pass over to the executor. That is the reason of the case I before cited, that upon a promise made to the testator to build him a house, deliver him wares, or the like, the executor shall have the action for the breach in the testator's lifetime, yet it is mixed with something of fauxity and deceit; it is called *et fraudulenter machinans et intendens*.

(*h*) Fitzh. Ab. (*i*) 11 H. 4. 54 b.

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But the ground and foundation of the action was an agreement, not a tort; so in frequent practice an executor may bring an action of debt for not setting out of tithes in the life of the testator; for there was a duty to him that was the foundation, a first cause of the action; the law made the contract, and superadded the penalty.

An executor may bring an action of debt for not setting out tithes in the life-time of the testator.

In this case there is *contractus*, or *quasi contractus*, between the guest and the innkeeper. In Bedel and Morris's case in an action against an innkeeper for his goods, the judgment was in *materia*, not in *capiatur*; for it is not such a contempt for which the King shall have fine, nor is it an action *contra pacem*. The law forceth the innkeeper to receive the guest's horse, else an action will lie against him; and the law forceth the innkeeper to preserve the goods of his guest, or else an action will lie against him. An innkeeper by reason of sickness was of nonsane memory, and then the goods of the guest were stolen out of the house: but as long as he kept an inn, the law required the goods of the guests should be safely kept; and therefore an action lay against him.

2 Cr. 224. Tr. Jac. B. R. N. E, 347. Moore 876. P. 6. Jac. Watbrooke *v.* Griffith. The law forceth the innkeeper to receive the guest's horse, else an action will lieagainst him. So as to preserving goods. 3 Cr. 622. M. 40 Eliz. B.R.

Again, the law forceth the guests to make a recompence. If he pay not, he may detain his horse, and is not bound to his action; or if he will bring his action, he may without any special contract have an action for his horse, and all the meat, drink, lodging, and other accommodations which he had at the inn.

If the guest pay not the bill, the innkeeper may detain his horse, or may bring an action for lodging, &c. without any special contract.

So that now the law makes the contract; and his not safely delivering the horse, though it be occasioned by his own negligence, yet is a breach of his contract in law, (which was to keep, preserve, and restore the horse). If there had been an *assumpsit* in fact to deliver goods (though they were after stolen) an action would lie by the executor for breach of it by the common law; the same reason here upon an *assumpsit*, or contract in law.

And this is the main reason that moves me in this case. The case hath beeu cited, but miscited at the bar out of Latch's Reports (which by the way are very ill printed); it was between Lemason and Dixon; the defendant was arrested on a bill of Middlesex at the suit of the testator, whereupon he intended to declare in debt. The bailiff of the liberty suffered him to escape. The testator died; and the executor brought an action of the case for the escape. The case was argued at the Bench, Hil. 3 Car. B. R. Justicē Whitlocke

Intr. Tr. 2Car. B. R. Rot. 1365. Latch. 167. W. Jones 173. 3 Calth. Rep. MSS. (*k*) 530. 551. 608. F. H.

(*k*) It is to be regretted that the third volume of Calthorpe's Reports was not delivered to the Trustees of the British Museum with the other two volumes; see above, note (*b*,) p. 21.

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and Dodderidge held it would lie by the equity of the statute 4 E. 3.; Justice Jones and Lord Chief Justice Hyde held the contrary. The case was not ever determined to this day that ever I heard of; and the more I think of it the more I doubt of it.

But there seems to me a great difference between the cases; for, first, there the escape being upon mesne process, the debt still remained against the party; and he was liable to the action of debt; here is no other remedy for his horse.

Secondly, If the plaintiff after the arrest had died, and before judgment, the executor could have taken no advantage of any proceeding, but the suit had abated, and did actually abate; here an interest, or right of action, in recompence of his horse, vested in the testator. The horse should have been part of his inventory, and by the same reason the *right of action* (*l*). But, thirdly, in that case there was no contract in fact, or in law, between the bailiff, who suffered the prisoner to escape, and the testator; it was a mere tort, and the action is grounded upon a mere tort. In our case I have shewed the law created a contract; and therefore the executor may bring the action.

F. N. B. 121.

If a man be taken in execution, and the gaoler suffer him to escape, an action of debt lies; for the party could not again be taken in execution, and the law created a contract between the gaoler and the plaintiff; and therefore the executor of the plaintiff may bring his action against the gaoler, and by the same reason here. But the action of debt would not lie against the executors of the gaoler upon such a contract by law; no more perhaps here against the executors of the innkeeper; for the executor shall not be charged in debt for the default of the testator.

Executor shall not be charged in debt for default of the testator in the performance of a contract in law. 1 Cr. 297.

I know no authorities in this case, but H. 8. Car. B. R.—the case was upon a judgment; the plaintiff took out a fieri facias; the sheriff thereupon levied.

But there is no resemblance of the case where the executor is defendant, and where he is plaintiff against the person himself who gave the cause of action, which is our case.

So, for these reasons, I conclude judgment ought to be given for the plaintiff.

(*l*) The manuscript leaves the sentence abruptly without the words "right of action."

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MANBY *v.* SCOTT. (*a*)

Tr. 1659. R. 1460. B. R.

(Where a wife leaves her husband against his will, he is not liable for goods sold to her, although they may be suitable to his degree, and although he did not allow her maintenance; and she did desire, before she bought the goods, to return to his house. Before the sale and delivery of the wares, the husband did forbid the plaintiff to trust his wife.)

BRIDGMAN, C. J.

Francis Manby and William Richards are plaintiffs, and Edward Scott, Esq. is defendant in an action upon the case, upon an indebitatus assumpsit in 91*l.* 17*s.* 5*d.*, for divers wares and merchandizes to the said Edward before that time, sold and delivered; and upon non assumpsit pleaded, the Jury found a special verdict:— In the Exchequer Chamber by adjournment from the King's Bench. Harg. MSS. No. 55, fol. 152. No. 57, fol. 2. No. 57, fol. 32.

That the plaintiffs were tradesmen in London at the time of the sale of the goods and merchandize in the declaration; that long before the action brought, *viz.* the 20th of April, 1646, Katherine, the defendant's wife, did depart from him against his will, and so continued absent from him divers years; and that afterwards, before the action brought, or the wares sold, she did desire to cohabit with her husband, which he refused to admit of; and that ever since she lived from her husband; and that afterwards, she living from her husband, and before the sale and delivery of the wares, the defendant did forbid the plaintiffs to

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(*a*) "Argument in Camera Scaccarii between Manby and Scott, argued by me 31 Januarii, 1662, 15 Car. 2. Reg." Harg. MSS. No. 57. fol. 2.

This case has been noticed in several books; 1 Keble 69, 80, 87, 206, 337, 361, 383, 429, 441, 482; 1 Sid. 109; 1 Mod. 124; 1 Lev. 4; 1 Vent. 24—42, and 2 Vent. 155. It had divided the Judges in the King's Bench: but was decided in favour of the defendant, according to the opinion of Hale, Bridgman, and seven other Judges in the Exchequer Chamber, against two Judges, Twisden, J. (who had before determined for the plaintiff) being convinced by the arguments of that majority; 1 Sid. 130; 1 Keb. 483. The argument of Mr. Justice Hyde is published in a book called a Treatise of Femes Coverts, 1732; and better in 1 Mod. 124. The Judgment of Hale, C. B. is printed in Bacon's Ab. tit. Baron and Feme. The subsequent cases, which seem to confirm the distinction very fully stated by Sir Orlando Bridgman, are carefully classed in a supplemental note in the last edition of Comyn's Digest, tit. Baron and Feme, Q. n. (*y*); Vol. II. p. 242.; and in Mr. Holan's note to Bolton *v.* Prentice, Str. 1214.

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trust his wife with any goods or wares whatsoever; and that divers years before the selling of the goods in the declaration, the defendant allowed no maintenance to his wife.

They further find that the plaintiffs afterwards, September 1, 1658, contrary to the said prohibition, did sell and deliver upon credit to the said Katherine, the defendant's wife, divers wares and merchandize in the declaration within mentioned for 43*l.* 1*s.* 10*d.*, being a reasonable price for the same; that the said 43*l.* 1*s.* 10*d.*, doth yet remain unpaid. And they further say that the said wares and merchandizes, so sold and delivered to the said Katherine, were necessary for her, and suitable to the degree of her husband.

But whether upon the whole matter the defendant did assume upon himself modo et forma, as the plaintiffs have declared, they ask the advice of the Court. Et si, &c., pro querent., &c. Et si non, &c., pro defend., &c.

Although the husband allow no maintenance for his wife, she cannot take up his wares, and by way of contract charge the husband, without his appointment or direction precedent, or consent subsequent.

Upon this verdict two questions have been made, and debated singly, et per se, without consideration of circumstance: whether, the husband allowing no maintenance for his wife, the wife can take up wares, and by way of contract charge the husband, *nolens volens*, without his appointment or direction precedent, or consent subsequent; and I hold she cannot.

And the second is, admitting that the wife may, in some cases, take up necessaries for herself where the husband allows her no maintenance, and the husband be charged by her contract; yet, whether upon the circumstances as they are found in this case, on the one side, that the wife departed from her husband against his will, and so continued absent from him divers years; and, secondly, that the defendant prohibited the plaintiffs to trust her; and on the other side, that she desire to cohabit with her husband, and he refused; and that the wares sold were necessary for her, and suitable for her husband's degree; I say upon all these circumstances, admitting the contract of the wife may in some cases bind the husband, where the husband allows no maintenance,—yet, whether the husband shall be bound to pay for these wares thus delivered by the plaintiffs, or not, I shall not consider it as a distinct point; because it will fall in my way in the prosecution of the first question, and the answers to the objections of the other side.

A wife is incapable, in the eye of the law, to make a contract; and, therefore, cannot by contract charge her husband without his consent precedent or subsequent.

First, then, I shall endeavour to prove this conclusion, that the wife cannot, by the common law, by way of contract, charge the husband *nolens volens*, without his consent precedent or

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subsequent,—*a conditione personæ*, from the condition or incapacity of the wife in the eye and consideration of the law, as to making a contract.

To make a good agreement and contract, there must be both a will and a power in the party that contracts: but the wife had neither a legal will, nor power to contract without her husband's consent; *cui in vita contradicere non potuit*, saith the writ of *cui in vita;* and she is *sub regimine, et gubernatione, et rationabili castigatione viri*, saith the writ of *supplicavit;* "she is *sub potestate viri*," (*b*) say our books. If a feme covert commit a burglary, a felony with her husband, (*c*) the law lays the fault on him, and excuses her, as *sub coercione viri;* and takes it to be not her will, but her husband's. Nay, go to contracts of record; a statute or recognizance by a feme covert is not voidable only, but void. If a feme covert levy a fine, it binds her, if it be not reversed in her husband's lifetime; yet not as it is a concord or agreement of a feme covert, but as a feme sole in point of estoppel, and for the honour of the Court that took it. But if a feme covert levy a fine, solely, by the name of Alicia, *uxor* J. S., this is a void fine; for the wife had no power to contract as a wife, without her husband; and there is no estoppel, because it appears upon the record itself that she was a feme covert. 1 Co. 155. Chedington's case.

4 Co. 61. Forse and Hembling. Reg. 232. F. N. Br. 80 Reg. 89. C. C. 112. Stamford. 10 Co. 33. Portington.

1 Co. 155.

It is clear, then, that the wife cannot contract for herself without her husband's consent; as little reason it is, that she contract for her husband without his consent. This is also agreed to me in all cases of contract by the wife for the husband, save only for necessaries for herself, though it be a contract for meat and drink, and necessaries for the family. The law looks upon it no other than as the contract of a servant, which is good so far as the authority is given, but no farther. I would not be mistaken that the law looks upon the contracts which she makes for her husband as the contracts of a servant. And all the authorities of our books which have been cited couple them together. What then should rationally make the difference between contracts for herself, and contracts for her family for necessaries? She hath no more legal will or power to contract in one case than the other. And in the action at law against the husband on such cases, the declaration distinguishes not whether she takes up wares for herself, or the family; but in both cases declares of a contract by the husband, but not by the wife.

The law looks on the contract of the wife which she makes for the husband, as the contract of a servant, and good only as far as the authority goes.

(*b*) "*E communement dit que feme covert nad ascun volunt et q la volunt del feme e subject al volunt le baron in judgment del ley.*" Note in the margin of the manuscript.

(*c*) The limitations to this doctrine are stated in Russel on Crimes, 23, 24.

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If a wife be beaten or slandered, she cannot, by law, compel the husband to bring his action.

Oh, but it is objected these are contracts in fact; this concerns her person, and is a contract in law of the husband; for the husband, by marrying her, is bound to find necessaries for her.

I answer, so he is bound to right her if she suffer wrong; yet if she be beaten or slandered, what remedy hath she if her husband will not bring his action? And yet these concern her person.

But to say the marriage makes a contract in law is the begging of the question. If there were such a contract created by law, the law would have enabled the mercer to have declared according to the truth, that the wife took up the wares for necessaries, and so charge the husband; and not ground the action upon a real untruth; a supposal of the delivery of the wares by the mercer to the husband, and his promise to the mercer to pay for them. In an action for slander or battery, or the like done by the wife, or done upon the wife; yet the declaration must be true, *secundum veritatem facti*, that the wife spoke the words, or made the assault, or the words were spoken against or assault made upon the wife.

And if the law had made the wife's taking up wares to be a good contract, without the husband's consent to charge him, the law would as well have enabled an action against both husband and wife, upon this personal contract, as it would upon a trespass, or fact done by the wife, or upon a real action. So that is my first reason: *a conditione personæ*, the wife hath no capacity to charge her husband, by way of contract, without his consent.

My second reason is upon the same ground, *ab inutili*. It was an argument urged by my brother who first argued,—if the common law gave the wife power to contract for clothes for herself, and to charge the husband, *nolens volens*, against his consent, the same law would also give her power to retain them, *nolens volens*, without his consent. But it is clear the husband may take them away; and the wife hath no remedy by action, or otherwise, for them. Some answers have been endeavoured to be given to this: As, first, that if the husband may take the wares away, the wife may take up more upon trust. But this is but an ill remedy, if the husband may still take them away. Secondly, I answer, the husband may by law keep his wife at home, so that she cannot go abroad to be trusted. O, but then it is an imprisonment, and a *supplicavit* will lie for it; and it is a cruelty to the wife to take away her clothes, and a *supplicavit* lies for that cause also; and the husband will be forced *uxorem bene et honeste tractare*. But I ask again,—what if he will not obey? Then he must lie in prison;

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why, but that my brother himself, who urged this, himself says, is no sufficient remedy to help the wife to alimony in the ecclesiastical court.

But, secondly, I deny a *supplicavit* will lie in this case; that lies not but where the husband threatens her, *de vitâ et membro;* the taking away necessaries for conveniency only (such as our case is, as I shall shew anon,) touch not *vitam et membrum.* Reg. Orig. fol. 89. F. N. B. 80. *si feme soit manassé per sa baron de lui bater or occider, el aura supplicavit,* and the writ *in quod ipsa de vitâ suâ, et de mutilatione membranorum per eum criminatus existet, ac damnum et malum aliquod eidem de corpore suo aliter quem ad virum suum ex causâ regiminis et castigationis uxoribus suis licitè et rationabiliter pertinet non faciat.* And if it did lie for imprisoning her, and restraining her liberty in the house, yet it is no imprisonment to allow her the liberty of the house, and restraining her from going out of it. O, but it is a *sævitia;* and for that the wife shall have her remedy in the ecclesiastical court. Be it so, it is that I contend for: but then it is not a remedy at the common law; and if the common law gives the thing, the common law would give the remedy, and not put you to resort *ad forum alienum.* So that the argument, under pardon, still holds. The wife cannot contract against her husband's will, because she hath no power to retain what she contracts for against his will.

Supplicavit lies only where a husband threatens his wife *de vitâ et membro.*

It is no imprisonment to a wife to confine her to the house, allowing her the liberty of it.

The wife cannot contract against the husband's will, because she cannot retain against his will, what she contracts for.

But my brethren, who have argued on the other side, have made a contrary use of these arguments *à conditione personæ.* They urge; that in regard the common law disables the wife to have any property of her own, to acquire any thing to herself, to bring any action by herself, or to contract for herself, that, therefore, *res ipsa valet;* and she may, for necessaries for herself, bind her husband by the contract.

I deny the consequence: the inference is much more natural, that because the law allows not the wife to contract for necessaries, therefore she may take her husband's money without his consent, and with it buy necessaries; or she may sell and pawn his goods, and without his consent raise money to buy necessaries. This my brothers will not say to be law; and yet this is the more genuine and proper consequence than to say because the law disables the wife, therefore, if she can get a mercer to trust her, she may take up upon trust, and so charge her husband. She that cannot directly take his goods or monies for necessaries, without his consent, much less may she charge his person, or *ex obliquo* charge his estate, without his consent. But the truth is, neither the one nor the other is a good argumentation; it is much more reason from this disability and incapacity of the wife to infer, that because the wife is thus disabled by the com-

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mon law to provide for herself, therefore there is another proper remedy provided for her, which, (as I shall shew anon) is the ecclesiastical court, which is the proper court for matters of matrimony, which is *contractus spiritualis*.

A third argument is, *ab inconvenienti*, the great inconveniencies that would follow if the wife might take up wares for herself against the husband's will, and that the common law should make this to be a debt to charge the husband. The particular mischiefs to the party have been already opened by my brother Windham (*d*): I meddle not with those, but with inconveniencies of another nature.

I ask the question of those that argue on that side. The wife wants necessaries *pro victu aut vestitu*. Suppose the cause of this want comes from herself, and the fault be hers. In this want she takes up wares of the mercer;—shall the husband be charged in this case, or shall he not? My brother Tyrrell seemed to allow that the husband should not be charged, where the husband allowed her sufficient, if she mis-spent. And the same reason is within reach in all cases where the husband is not in fault, but that the cause of the necessity or want springs from herself, without his fault: and my brother Atkins' opinion went this way. My brother Twisden held (and so Mr. Jones argued at the bar) that as long as she was his wife, let the fault be what it will, she was to be maintained by him; and when she wants, and takes it up, the law created a debt, and her husband must pay it: and in truth most of the arguments of those that argued on that side tended that way, distinguishing (*e*) whence the cause of the wife's wanting of maintenance proceeded.

Admit this last opinion to be law, that if the wife want apparel, or other necessaries convenient for her degree, that the wife may take it up, and that the husband be charged for it; though the fault and cause of want of maintenance were in her; then the mercer's demand here of money for clothes taken up, after that the wife desired to cohabit with her husband, is but very modest; for her husband may be charged not only for the time since her return for her diet and apparel, but during all the time of her voluntary departure and absence against her husband's will.

This is one mischief.

I shall give you another instance:—The husband allows his wife money to buy clothes; she spends it at cards, or, perhaps, worse, whereby she wants apparel. She takes it up of a mercer; this is for necessaries: the mercer sues the husband. Admit

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(*d*) 1 Keble 339. (*e*) 1 Keble 207.

this opinion to be law,—what will bar the mercer from recovering? 1662.

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I will put it further.—The wife having taken up apparel from the mercer, she wants money for play, and to raise it sells or pawns the apparel which, perhaps, the week before, she took up upon trust. Well, now she is in a condition again to want apparel convenient for her degree; this mercer, or another mercer, furnishes her again; and so I may put this question from time to time, *ad infinitum*. What bar is there against the mercer's action if this be law, that when she wants necessaries, whatsoever the wife's fault is, the husband is chargeable for what she takes up.

The husband hath a family, and keeps a house; and would allow her all things fit, if she would cohabit with him: but she will depart from him, and lives of herself. Though he keeps, and must furnish a table suitable to his degree, which would be sufficient for his wife as well as himself; yet now he must pay for her diet; and not only so, but also for her servant's (for it is suitable to her degree to have them). She went away, and stays away in an obstinacy, whiles she (instead of love, honour, and obey,) stands in defiance of him. If this be not an encouragement to disobedience, I know not what is. O but, says my brother Twisden, she must not starve though she be an ill wife. I answer, when she voluntarily departs from him, if she will rather starve than not have her humour,—whose is the fault? The Scriptures say, "he that will not work, let him not eat." So may I say, if she will not return with the prodigal, she must eat husks with the prodigal.

O, but in this case she did return, and desire to cohabit with her husband. I shall give that an answer anon; that is not the case we are now upon. The case now by way of supposition or admittance is,—the wife is in fault, and continues in fault,—whether whilst she is in fault, and so continues, the husband shall maintain her? Truly if he must, he must then lie down, and sink under the burthen. I shall use my brother's own phrase; the husband must *demittere auriculas ut iniquæ mentis asellus*. But that is not all: if this power and liberty be allowed, it gives temptations to inconveniences of another nature. If the wife have this liberty, that though the husband would give her maintenance at home, yet she will abroad, and her husband shall be forced to maintain her; or if she do not depart, and yet wants maintenance convenient for her through her own fault, yet the husband shall be punished, and pay for it, and she shall go free, I know not where it will end.

But now, on the other side, grant that it is not sufficient to

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prove that the wife wants necessaries, but that the cause of that necessity will come into consideration, if the mercer brings his action for the wares, and this comes in question before a jury, now you make the jury a consistory; the common law, which is a law of great modesty and decorum, hath left matters concerning matrimony, such as unchastity, frigidity, free contract, and the like, *ad aliud examen*, as thinking them fitter for a private audience, and for a private examination, than for such a public trial as the common law requires. But upon this trial by jury the whole carriage of the husband to the wife, and of the wife to the husband, must be ript up; and those circumstances, *arcana familiæ*, scarce fit to be spoke in private before a confessor, laid open, not only to a jury, but *ante pro-fanum vulgus*—all the bystanders; and the consequence of this is an embittering of their spirits, and induration of their hearts one against another, to make the breach so wide that it can never be closed.

There is another thing in it too; and that is, the jury, admitting this matter comes to be determined before them, they are only to try the matter, whether the one or the other be faulty: they cannot, as in such cases were needful, put in any temperament, or lenitive, or any thing that tends to reconciliation. And all this is done upon a collateral issue of *non assumpsit*, where what one will give in evidence against the other, touching the cause of the difference between them, doth not appear. And so it will be almost impossible to provide for a defence (*f*).

Where the law is clear and settled, you must not make a new construction and declaration of the law, because of inconvenience, but leave that to be remedied by the Parliament. But when it is a question whether this be the law or not, the argument *ab inconvenienti* is very strong; for it is not to be *presumed* that that which is inconvenient or absurd to be done is agreeable to law.

One of my brothers urged against this argument *ab inconvenienti*. If there be a defect in the law, it must be remedied by parliament: but it alters not the law. If I grant him *this*, he gains not by it, for it answers his objection which he made from the defect of the ecclesiastical law to give a full remedy: but the difference is apparent, as my brother Hide (*f*) said. Where the law is clear and settled, you must not make a new construction or declaration of the law, because of inconveniencies, but leave that to be remedied by the parliament. But when it is a question, whether this be law or not, the argument is very strong; for it is not to be presumed that that which is inconvenient or absurd to be done is agreeable to law.

The next reason is this,—in case the husband will not allow maintenance, or alimony to his wife, the husband is compellable to it by the ecclesiastical law.—That causes of alimony are

(*f*) 1 Keble 430. 1 Mod. 127, 128.

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of ecclesiastical conusance, and that upon a libel by the wife, *causâ sævitiæ*, that court may decree alimony (that is, money to supply her with necessaries,) is not altogether denied, and yet but faintly *allowed*, (*g*) by my brethren that argued on the other side. But the authorities in our law which have been cited are full enough on it, 12 Jac. 2 Cr. 364., Hyatt's case. 7 Car. 1 Cro. 220. Drake's case. 1 Cr. 16. 1 Car. Green's case. To which may be added, Rooke's case. A divorce, *causâ sævitiæ*, in the ecclesiastical court, is allowed; and in such a case exempts the woman out of 1 Jac. c. 11. which makes it felony to have two husbands. But if there were no express authority in our law in it; yet it having been the constant perpetual practice in the ecclesiastical court, *in causâ sævitiæ*, or other cases of separation, to allow alimony or maintenance to the wife, we ought to take notice of their jurisdiction. We take notice of the jurisdiction of the courts in the counties palatine, Wales, and the like; *a fortiori*, of the ecclesiastical courts, which have been as ancient as Christianity. They are in many cases of temporal conusance, subservient to the common law; and, where their arm is too short in matters of ecclesiastical conusance, the common law is assistant to them.

The constant perpetual practice in the ecclesiastical court is to be noticed in courts of law.

Causes matrimonial and testamentary have been time out of mind of ecclesiastical conusance, saith the stat. 24 H. 8. c. 12; and what can be more a matrimonial cause than a cause of alimony, where the husband denies maintenance to his wife. The contract of matrimony is spiritual, and it is part of that contract that in *facie ecclesiæ* he endows her of his worldly goods; and that which concerns the performance, a breach of that contract is most proper for that Court. The precedents in Henry the Third's time, which have been cited of Emma de Pinkney, and Sarah Fretchingfield, (*h*) of excommunication in

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(*g*) "Denied" in the manuscript.

(*h*) In the imperfect argument preserved in No. 57 of the manuscript, fol. 37. b. and partly printed at the end of this report, the cases of Emma de Pinkney, and of the wife of Fretchingfield are thus stated:—

Rot. cl. 7 H. 3. M. 3. Emma de Pinkney's case. Her husband was excommunicated *eo quod prædictam Emmam affectione maritali non tractabat*; and, therefore, in aid of the ecclesiastical court, a writ went to the sheriff of Bucks, *quod de maritagio prædictæ Emmæ* (I conceive her own land, or lands given in frank marriage, it is) *eidem Emmæ rationabili estoverium suum inveniat, donec idem Laurentius, vir suus, eam tanquam uxorem suam tractaret.*

Rot. cl. 7 H. 3. m. 4. a second writ issued in the same case, reciting the husband's cloigning himself out of the country, after an *excommunicato capiendo*; and that the sheriff had seised his lands in Cestresham, which were *maritagium ipsius Emmæ*; and thereby commands him to assign to the said

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the ecclesiastical court, for that the husband did not *uxorem affectione maritali tractare*, as the one, or *lege maritali*, as the other hath it, though I do not make use of them as authorities in law, yet I may as evidences of fact, that causes of that nature were then handled in the ecclesiastical courts. And there is none but knows that the husband may be compelled *per coercionem ecclesiasticam ad impendendum et præstandum obsequium conjugale.* It was rather insinuated than urged, on the other side, that alimony is not mentioned in the statute *circumspectè agatis, articulis cleri*, or in Cawdry's case, 5 Co. 1.; and therefore not of ecclesiastical conusance. For the two first mentioned only some particulars of ecclesiastical conusance; and Cawdrey's case is express, 5 Co. 9. et 40, that other causes are of ecclesiastisal conusance besides those there particularly enumerated.

But this is so clear, that at length it is confessed that, where the suit is, *causa sævitiæ*, in the ecclesiastical courts, there shall be a divorce and alimony allowed. But divorce is the principal (say they), and alimony is the consequent; and alimony is not allowed but where there is a separation; and

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Emma, *per visum proborum hominum unde materiam victus, et vestituram rationabiliter habere possit.*

Rot. cl. 8 H. 3. m. 9. a writ issued to the sheriff of Suffolk, *quod habere faciat*, to Sarah, the wife of Stephen Fretchingfield, *estoverium suum de terris ipsius Stephani in Fretchingfield qui excommunicatus est eo quod non vult ipsam lege maritali tractare, donec idem Stephanus eam tanquam uxorem suam tractaverit.*

"Which cases I mention not as authorities in law, but as evidences of fact, that in these cases the ecclesiastical courts meddle with these matters of œconomics between husband and wife. She complained because he did not treat her *lege maritali*, in one of the precedents, *affectione maritali*, as the other is. He that suffers not his wife to have necessaries I am sure does not treat her *affectione maritali*."

See 1 Keble 71. where these cases seem to be otherwise noticed.

Lord Hardwicke in Middleton *v.* Crofts, Ridgway's Reports 129, establishes the ecclesiastical jurisdiction upon ancient usage: "As to the second general question, since we are clear of the opinion that the canons of 1603 did not bind the laity, the next question will be, Whether the spiritual courts have not a power to punish by the ancient canon law, received and allowed before that time, by the general usage and custom of the realm?—And we are all of opinion that they have such a jurisdiction. That many such usages have obtained in this realm I have already shewn by what I have mentioned of Caudrie's case, and this we think is really warranted by 25 Hen. 8. where there are words of such import; and upon this vests the only and true foundation of all ecclesiastical jurisdiction within this realm." Godolphin 489. cited in 2 Burn. Eccl. Law 448., says, "that marriage was at first tried in the temporal courts; but afterwards, by the concession of princes, such causes were determined in the spiritual courts." And see 2 Burn. Eccl. Law 29—51; and Jura Ecclesiastica, Vol. II. p. 13.

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there are no precedents in any case where you shall sue there for alimony originally, but it comes in *consequenter;* and, therefore, having jurisdiction in case of divorce, the alimony shall be allowed as a consequent of the divorce, and not otherwise.

And, secondly, they infer this by the common prohibition upon the register 34., "*ne teneatis placitum in curiâ Christianitatis de catallis et debitis, nisi catalla illa, vel debita sint de testamento, vel matrimonio;*" and this is not *matrimonio.*

In both which objections there is, under favour, a mistake. In the first it is very true that the libel, where the husband allows not maintenance, is *propter sævitiam*, and expresses wherein,—for denying necessaries. And what greater cruelty can there be than not to allow them to her? But it is not necessary that the suit end in a separation; first, if the wife complaining desire it not, for she only sets forth her complaint, and desires *remedium congruum, jus et justitiam in hac parte fieri atque cum effectu ministrari.* Nay, if not only alimony is desired, but society also, as commonly it is in such case, she may pray that her husband may be compelled *ad cohabitationem et consortium eamque maritali affectione tractand.;* and, secondly, if she do desire a separation *causa sævitiæ*, she may be allowed alimony; and yet, if the ecclesiastical court think fit, be tied to live with him, especially if it be only a privative *sævitiæ.* Nay, if it be a cruelty by beating, or the like, yet he may give caution *ad tractandam maritali affectione;* and if he put in such caution as the Court shall approve of, no sentence of separation passeth. And if there be such a separation, yet it is but with a *quousque* neither. But the husband is tied neither to the one, nor to the other, if the fault be not in the husband.

If a wife desire a separation on account of cruel treatment, she may be allowed alimony; and yet, if the ecclesiastical court think fit, be tied to live with her husband—he giving caution to treat her well.

And for the second,—that alimony is but a consequent of the divorce, or separation; *ex errore sequitur error;* as it is an error, that there must be of necessity a separation in such suit, so it is an error, that alimony cannot be demanded in *causa principali,* but must come in only as an accessary, and consequent to the sentence; for the libel may be (supposing a *sævitia,)* that he should allow her alimony, *donec* he shall *cautionem interponere* of better usage; or the petition in the libel may be, *ad tractandam maritali affectione* in general, which implies allowance of alimony.

It is an error that there must be of necessity a separation upon complaint by a wife of the cruelty of her husband—and it is a mistake that alimony cannot be demanded in *causa principali.*

And the objection upon the prohibition *de debitis et catallis quæ non sunt de testamento, vel matrimonio,* reacheth not to this case; for, first, if you take the suit in the ecclesiastical court for alimony, to be a demand *de debitis et catallis*, you must take it to be a suit *de debitis et catallis quæ sunt de matrimonio.* The word "*de*" is not to be taken critically (as my

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brother Twisden would have it,) but "*de matrimonio*" must be taken for "concerning matrimony." If a divorce be, the wife may sue in the ecclesiastical court for her goods; and yet this is not "*de matrimonio*," if you take not the words "*de matrimonio*" to be expounded for, "concerning matrimony." But, secondly, the meaning of that prohibition *de debitis et catallis quæ non sunt de testamento vel matrimonio* is also mistaken. In causes matrimonial you may sue in the ecclesiastical court for a sum certain, or goods in specie; as if goods in specie be promised in marriage, or 10*l.* in money, the party may sue in the ecclesiastical court for them. F. N. B. 44 A. So if there be a divorce, the woman may sue there for the goods in specie, or the money, that she brought in marriage to the husband. 13 H. 3. 21. F. N. B. 44 C. 28 H. 8. 13. Dyer. And so in causes testamentary, if a legacy or goods in specie be devised, the legatee may sue for it there. But generally, in other cases ecclesiastical, which are not *de testamento vel matrimonio*, you cannot demand either goods in specie, or a debt, or sum certain; neither indeed doth the libel for alimony demand any sum certain, though in the conclusion alimony be ascertained by the court. But if you will construe, as some do, the prohibition *de debitis et catallis* to extend to prohibit all recoveries of monies, or damages in other cases but testamentary or matrimonial, it is a great mistake; for almost all causes *ad instantiam partis* end in damages; and in those causes which are *ex officio*, or merely *pro reformatione morum*, as *pro injectione manus in clericum*, &c. yet *expensæ litis* are adjudged. And *commutatio in rem pecuniariam*, (nay, in some of these cases *pœna pecuniaria*,) is allowed, as you may see by the statute *de circumspecte agatis*. If a suit be for leaving the churchyard uninclosed, or *pro ecclesia discooperta, vel non decenter ornata, alia pœna non potest infligi quam pecuniaria*, saith the same statute.

In causes matrimonial and testamentary, a sum certain or goods in specie may be sued for in the ecclesiastical court; but generally not in other cases ecclesiastical, although damages, and sums to be ascertained in the conclusion by the Court, may be there adjudged in other causes.

In all suits for subtracting of tithes before the statute 2 Ed. 6., and at this day for subtraction of church duties, oblations, procurations, and the like, the loss or prejudice must be recompensed in monies.

So that I conceive, with some clearness, notwithstanding these objections, there is a proper remedy for a wife, (when her husband denies her maintenance,) in the ecclesiastical Court.

And in truth, how can it be otherwise? First, the ecclesiastical law gives her power to sue her husband, and to set forth her complaint; and not only so, but provides for her pending the suit. But by the common law she cannot so much

The ecclesiastical law gives a wife power to sue her husband, and provides for her pending the suit: but by the common law she cannot sue him.

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as sue her husband. Secondly, the ecclesiastical law gives a direct and proper remedy by demand of alimony; the common law, if it gives a remedy, it gives it but *à latere*, by a side wind, and upon a peradventure,—if she get a mercer to trust her; and that will hardly be unless the mercer get half in half by his goods, for he runs the hazard. If it be taken up by the wife not for necessaries, or if the husband was not in the fault, he loses his wares. Thirdly, the ecclesiastical law hath a proper way of examination of the differences between a husband and wife by the bishop, who is *communis parens*, who takes it to his own audience, and judges where the fault is; and does it privately, and endeavours a reconciliation. And if that cannot be had, then he judges the measure of the alimony according to the demerit: in some cases a greater, in some a less proportion is required. But by this way, at the common law,(*i*) the wife becomes first her own judge what is suitable to her degree; then the mercer, a stranger, is brought in to take her part; and this necessarily brings on a suit against the husband. And then all must be brought before a jury, and a great many bystanders; and those œconomics, and the secrets of the family, (*i*) which the wisdom and modesty of our law thought fitter for another kind of examination, brought upon the stage; and yet this Jury have no power to commensurate the maintenance according to the demerit of the party. But be the wife never so good, or be she never so bad, *Tros Tyriusve, mihi nullo discrimine habetur*, if the wares be suitable to her degree, the Jury must find them to be necessaries for her; and necessaries for conveniency, alike both a good wife and a bad wife must have awarded by this Jury.

And now I demand, where is the want of remedy in the ecclesiastical court for a good wife, whose conversation will endure the test, where she meets with a churlish husband who will not allow her necessaries.—She, in conscience of her duty, is willing to live with him; but not to be starved. She repairs to the bishop, and is not her own judge; he calls the business to his private audience, as is usual in such case, and hears both parties,—finds the husband,—endeavours a friendly reconciliation.—The husband is obstinate, and will not obey;—then he directs proceedings upon proof; and thereupon, finding the husband in fault, gives sentence according to the merits

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(*i*) Suits at common law against husbands by tradesmen for supplying wives with necessaries have not been unfrequent; and *the circumstances* of each case seem to have been usually examined by the Jury. Child *v.* Hardyman, Strange 875. Robinson *v.* Greinold, 6 Mod. 171. 1 Salk. 119. Govier *v.* Hancock, 6 T. R. 603. Hain *v.* Toovey, Selwyn, N. P. 260. n. (*p*)

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In cases of complaint by a wife of her husband, as soon as proof is made of the marriage, maintenance is allowed to the wife to support her during the suit, and to pay the expenses of it.

of the case, and the husband's estate. Here is a clearing of her innocency, and a just provision for her.

O, but shall she starve in the mean time? No,—upon the very complaint, as soon as it doth *constare de matrimonio*, he shall allow her maintenance, *pendente lite*, both to maintain her, and pay for her suit. (*k*)

O, but what if the husband will not presently obey the order, or decree?—there is no sequestration of his estate;—that is the great objection which is urged upon the defect of the ecclesiastical law. I shall answer it at full anon, that at length he will be compelled to obey. In the mean time let me say, she hath as good a remedy, if he will not obey, as the other side do propose.—They would have her borrow from the mercer.—But she may borrow of her friends; and the ecclesiastical court will sentence her husband, if in fault, to pay to the wife so much as his obstinacy caused her to borrow for necessaries. It will not indeed suffer the mercer, who is a stranger, to come into the quarrel (that is not fit,): but it will enable her to pay for what she borrows; yea, and to retain it too; which the common law, as I said before, cannot do. (*l*)

O, but suppose the wife be a bad wife,—shall she starve? shall she forfeit the alimony? If the wife had eloped, she had not forfeited dower before the stat. of Westm. 13 E. 1. c. 34.—shall she forfeit maintenance? To that I answer,—the act of the wife shall not forfeit her alimony while she is his wife: but it may suspend it, and it may lessen it. If she will voluntarily go away without cause, and stay away without cause, the bishop may justly refuse to sentence alimony till she return and cohabit with her husband; in that case she must starve, if she will keep her humour.

Suppose she hath been faulty; nay, suppose she hath been convict of it, and be divorced *causâ adulterii*; yet she shall have alimony. But it must be like that allowed to a clerk that is convicted, and delivered to the ordinary, as you may see in the constitution of Simon, archbishop of Canterbury, mentioned in Staundforde 141, "*in 4ta et 5ta feriis, et in Sabbatis, de pane doloris et aquâ angustiæ semel in die, cæterisque diebus in pane, et debili cervisia; die vero Dominicâ, propter honorem ipsius diei et excellentiam, de pane et cervisia et legumine eisdem tantum modo ministretur.*" I mean not in that strictness: but yet her allowance must not be according to the degree of her husband, but the quality of a

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(*k*) So Smith *v.* Smith, 2 Phillimore 152.

(*l*) Equity seems to have extended the rule of the ecclesiastical court; Preced. in Ch. 502, and 1 P. W. 482. cited in Bacon's Abr. tit. Baron and Feme, H. See 1 Fonb. 91, n.(*h*).

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penitentiary. And this very reason alone is enough, in my judgment, to shew that the common law doth not allow this way of the wife's providing herself alimony, by taking it up of the mercer, and trying it by a jury; for that in this suit for wares the jury determine only what is necessary according to the degree, but not what is convenient and proportionable to the merit or demerit of the wife.

And this brings me, before I pass over this head of the ecclesiastical jurisdiction, to consider shortly of the circumstances in our principal case, as they are in the verdict; which are these, on the one side,—First, that the wife departed from her husband against his will; and so continued absent from him many years: and, secondly, that after she desired to cohabit with him, he refused.

But before I consider these circumstances, the insufficiency of the verdict itself in finding them seems to me to point out how improper they are for a jury. It finds that the wife departed from her husband against his will: but finds not for what cause she departed. It might be her husband joined with rebels; and then her departure was justifiable. It might be it was of a gadding disposition, or disaffection to her husband's person; and that was unjustifiable. It finds she desired to cohabit with him, but he refused to admit her: but the cause of this refusal is not found. Perhaps it was the husband's fault at first that she departed; and that she lived since inoffensively; and then there is no cause of refusal: and, perhaps, she lived scandalously; and then there might be cause of refusal. All which particulars would and might have been considered in a suit in the ecclesiastical court for alimony.

If a husband join with rebels, his wife may leave him.

But, take the circumstances as to common understanding, they shall be taken upon this verdict, that the wife departed without cause, I conceive the husband hath done nothing in refusing cohabitation, or alimony, which is not justifiable by the ecclesiastical law; and admit that our law will, in such a collateral suit as this, take notice of the cause of alimony (which is proper for the ecclesiastical court) they must take notice also of the rules of the ecclesiastical law in such case; as in other cases, where an ecclesiastical matter or marine cause comes before us, we judge according to that law, ecclesiastical or marine.

If ecclesiastical or marine matters come before the common law judges, they must take notice of the ecclesiastical or marine laws.

First, when the wife departs voluntarily from her husband without cause, and against his will, and continues so divers years, she breaks her promise made *in facie ecclesiæ* "to love, cherish and obey him, till death her do part;" and without question it is in many respects, both in relation to herself, and relation to her husband, a great injury to the husband. Whilst

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she is in this condition she makes herself no part of his family, she puts herself out of his protection, as my brother Hide paraphrased it; and, therefore, he is not bound to maintain her (as I conceive) though there be nothing proved *in læsionem pudicitiæ.*

[*Si ipsa, propriâ temeritate, sive culpâ mariti, sit extra consortium viri, non tenetur maritus extunc ei, extra consortium suum existenti, alimenta subministrare; videtur enim virum alendi obligatione eximi quoniam culpâ suâ extra viri consortium est.*]

30 E. 1. Placita Palti. 231. (*n*).

Margaret de Camoy's case, 31 E. 1. which is touched C. m. ch. 435. (*m*), but is there misreeited, is somewhat severe. The stat. West. 2. c. 34. which was made in the same King's reign, 13 E. 1. provides, "*Si uxor sponte reliquerit virum suum, et moretur cum adult. amittat dotem suam, &c., si super hoc convictata; nisi vir suus sponte et absque coertione ecclesiæ eam reconciliet.*" The case there was,—She by her own, and by her husband's consent, departed with Sir William Paynell, and remained with him during her husband's life; and a writ of dower brought by her and Paynell, whom she after married, the stat. of West. 2. being pleaded in bar, though she offered to take issue that she did not *in adulterio moram traxere*, and that she had also made her purgation before the bishop, and so was innocent in the judgment of the ecclesiastical court, yet the exposition of the statute laid the weight upon her spontaneous departure from her husband, "sponte reliquerit virum et abierit." And because the matter *ad inquirendum de adulterio*, was not proper for the common law, nor *ad curiam regis pertinet super adulteris inquisitionem patriæ capere*, saith the record (though the words of the statute are *in adulterio moram trahere*), they judged upon the outward act, the departure from the husband, that it was sufficient to debar her of dower.

That was *contemporanea expositio*: but yet I take it to be hard law. The use that I make of it is, that if the voluntary departure be cause to bar dower, I am sure it is, *pro tempore*, a cause to bar her of the privilege of the family, whilst she excludes herself out of it.

So by M. Ch. c. 7., the wife, after her husband's death, is to have her quarantine, that is, to live in the house forty days; and, during that time, to have *rationabile estoverium de communiâ*. In that case, if the wife depart from the house within forty days, my Lord Hobart, in Colt and Glover's case, 153., saith, "that she cannot return when she will, and take her qua-

(*m*) 2 Inst. 435.

(*n*) Rot. Parl. 30 E. 1. No. 2. which is in the printed volume, I. p. 146. A. D. 1302.

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rantine for the rest of the days;" and he cites 6 E. 6. Dyer 76. for it: but I do not find the authority warrants it. But certainly it is so far law, that when she returns, admit she shall be allowed *estoveria de comm.* for the remainder of her quarantine, yet she shall not be allowed *estoveria de comm.* for the time she was absent. No more shall she, by analogy of reason, be allowed alimony here for the time of her departure.

But then the next circumstance comes to be considered,—that the wife desired to cohabit with her husband, and he refused to admit her, or to allow her maintenance;—whether now, after this desire, and offer of reconciliation, and his refusal, she be not restored, *ad integrum*, to her right of maintenance? And in that case also, taking the case barely as it is found in the verdict, without other circumstances, I think she is not restored, *ad integrum*, to her right of maintenance (*o*).

My reason is this:—By her voluntary departure without cause, the law will adjudge a fault, and a scandal committed.—["*Si uxor, quæ culpa sua recesserat, pœnitentiâ ducta ad virum rediens, nolit admitti eam, extunc uxoris culpa purgata in virum transgreditur: tenebiturque ipsi seorsim habitanti alimenta præstare:*"] but there it must be *pœnitentiâ ducta*, and external evidence must be given of that penitence to the husband and to the church. It is not enough, to desire to cohabit: but there must be (if it be required) satisfaction to the church, and satisfaction to the husband, to wipe off a scandal, if the church shall desire it, or to wipe off suspicion if the husband shall desire it. She may be, and it is just she should be, put to her purgation; as it was in Margaret Camoy's case. When that is done; or, if that be not required (the fault having been in the wife) the law may require a caution from her.

In a case where either party is faulty, the law may require *idoneam cautionem;* as appears by the writ *de cautione admittendâ*.—If it be the husband, he may be put *ad cautionem pigneraticiam aut fide jussoriam ad parendum mandatis ecclesiæ*, f. 63. H. (*p*); that is, by land security, or by bond; for the law, admitting the ecclesiastical court *habere cognitionem de principali*, will allow them to take security; as a bond for putting in an inventory, or the like. But if it be the wife who is to give satisfaction to the ecclesiastical court; yet she may be forced to put in *idoneam cautionem*, such an one as she

If the husband has committed a fault against the wife, and after voluntary separation is desirous of returning to her, she may refuse until he give real security, or a bond to obey the injunctions of the church.

(*o*) In Child *v.* Hardyman, Str. 875. Raymond, C. J. seems to be of a contrary opinion.—"If the husband refuse to receive again the wife who elopes, from that time it *may* be an answer to the elopement;" and see on this point Mr. Nolan's note to Bolton *v.* Prentice, 2 Strange 1214.

(*p*) F. N. B. 63 H.

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can, that is, *cautionem juratoriam*, to swear she will *parere mandatis ecclesiæ, in formâ juris* in that case; so that, supposing the wife were in fault for her departure, and long absence, (as I take it by way of admittance) if her husband have refused cohabitation till he have had satisfaction, the fault is not his. When she had offered to cohabit with him, and he refused, she ought then to have applied herself to the bishop, as the common parent, and have offered satisfaction; and then, if either her husband had not required it, or that requiring it, she had given such satisfaction as the church thought sufficient, she was *restituta ad integrum*. If she failed to give satisfaction of her innocency, yet gave satisfaction of her penitency, and her husband would not absolve her, the law would restore her, though not *ad integrum*, yet so far as to have such a proportion of competency as the condition of a penitent person required.

If the wife has been in fault, and desire to return to her husband, she may be required to swear to obey the injunction of the church. If the husband refuse to receive his penitent wife, without satisfaction, she may apply to the bishop, as the common parent, and offer it; which, when accepted, will restore her to her right unblemished.

If the wife give satisfaction of her penitence, although not of her innocence, and her husband will not absolve her, the law will restore her; though not absolutely, yet so far as that she may have such a maintenance as the condition of a penitent person requires.

And that is the proper method in such cases, and is a further argument of what I have been thus long about to prove; that is, a proper adequate remedy in all those cases of alimony or maintenance for the wife, whether faulty or not faulty, in the ecclesiastical court; and that this new way of taking up wares of the mercer, and a trial by jury, who cannot judge properly of the merits of the case, or commensurate the maintenance of the wife proportionable to her innocency, or guilt, cannot give a just remedy therein.

It is to be presumed that the ecclesiastical court, being judges of a cause, shall do right.

[It is objected that we give by this too great a latitude to the ecclesiastical court: but it is to be presumed that they, being judges of the cause, will do that which is just and right; especially in those cases which are in the peculiar audience of the Bishop himself. But if they should exceed their power, the common law hath a superintendency over them, and grants a prohibition. But can they grant a prohibition to a jury? Allow them this power to determine matters of this nature; they cannot put any bounds upon them in it. 4 Co. 29. Buntling's case, "*en cases de leur conusançe, les Judges de nostre ley doient doner foy et credit a leur proceedings et sentences.*"]

I have done with this reason concerning the remedy given by the ecclesiastical court.

My last reason, that the wife by the common law by way of contract cannot charge the husband *nolens volens*, without his consent precedent or subsequent, is *ab authoritate*; and that both negative and affirmative.

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Argument from the absence of precedents.

Ab authoritate negative.

There is not one authority in any of the books of law, which makes good the distinction, that the wife, who cannot (as is confessedly agreed) contract for necessaries for her husband's family, to charge him without his consent, can yet, by way of contract, charge him for necessaries for herself. If the law had been so, in so many successions of years as have been since Henry the Third's time, from which time we have reports of cases printed, this law would have been expressed in some of those books; at least, in some other authentic record, before these late troubles; considering it is a case of every day's practice, that differences arise between husband and wife. It is Littleton's argument upon the statute of Merton, if any such action might have been brought for this matter, it shall be intended, that at some time it would have been put in use; and the same argument is made use of by my Lord Dyer, (*q*) to prove, that no writ of error lies out of the Cinque Ports; and by my Lord Coke, 1 Rep. 88., in Corbet's case.

There is but one only authority pretended on the other side; that is, 11 H. 6. 30. by Martin, the words are these:—"*Si ma feme appromta dun home, et lui array melior que atteint a mon estate, jeo ne serra charge de payer c'est appromplage, comment que il devient al oeps et profit le Baron pur ceo que la feme convient de necessity del array; mes pour ces que el passe son estate, le Baron ne serra charge.*" Hence they infer Martin's opinion, that the husband shall be charged where the wife borrows money to buy *necessary* apparel.

[The case was:—William Scot brought an action of debt for 20*l.*, against the Abbot of Fountain; which he lent to one Roger, his predecessor, with which he bought forty quarters of wheat, which came to the use of the house. The defendant pleads that this Roger was but a monk at that time, though he was *de facto* installed Abbot. Thereupon the question grew, if he were a common monk, and not an officer, as cellarer, or the like; whether in the vacation he borrowed money with which he bought goods, which came to the use of the house, whether the house shall be charged. Martin thought it came to the use of the house: that proves not that this contract of the monk will bind the Abbot; for if he will borrow, and build, and do more than the house will have, the Abbot shall not be charged; yet it came to the use of the house. *En mesme le manner, si ma feme, &c.*; so saith he, it was his folly to make this contract with a monk, that was no officer in the house.

(*q*) Litt. s. 108.

(*r*) Dyer 376. pl. 23.

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And after, the issue was whether the said Roger was Abbot at the time of the contract.]

This opinion can make nothing to our case, unless you admit that the monies were taken up by the wife *when she had no consent, or power from the husband to do it;* and therefore it is strange that it should be argued as an authority, when they that urge it will not say it is law, unless it be admitted that the wife in that case has a general power from her husband. For admit it were law, that the husband should he charged for wares taken up by his wife, without his consent; yet that he shall not be charged for money borrowed by his wife, without his consent, to buy wares with, is the opinion of Martin as they urge it; for *if* the law charge the husband to pay the money borrowed by his wife, as due upon a contract, or *assumpsit* in law, it must arise upon the very borrowing of the money, and shall not depend upon the consequent effect,—employing or not employing the money aright,—which is not known when she borrowed it. So that the opinion of Martin, that the husband shall be charged to pay the appromptage, as money borrowed, *as they would urge it*, is clearly against the law, as they themselves cannot deny.

My brother Tyrrell foresaw this; and therefore offered a double answer to it.

First, that the appromptage or borrowing here must not be understood that the wife borrowed money, but borrowed goods; which is so strained a construction, and hath so much of impropriety, as nothing can be more. If the wife should borrow goods to array herself, then the goods were to be restored, not paid for. But Martin speaks of the husband paying for the appromptage; and the very principal case, as also the case which ushers this in, is express in borrowing money, to lay it forth in necessaries for the use of the abbey; and of such an appromptage Martin speaks.

Secondly, saith he upon Martin's opinion, the antithesis is, between array for the wife that is necessary, and that which is excessive. I agree it: but it makes nothing for them, unless the antithesis had been between *the husband's consent and dissent;* neither of which are expressed or mentioned in the case.

It is a reasonable supposition that the wife, who is allowed to be housekeeper and tomanage the affairs of

But it is but a reasonable supposition in the way of evidence, if I allow my wife to be my housekeeper, and to manage those affairs, that the wife, who hath the management of the family, hath also a general power and authority from me to buy necessaries for it; and so for herself as part of the family. And upon supposition of such *a general authority,*

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Martin's opinion is good law; for she having such a general authority, if she borrow money, and bestow it upon necessary apparel, the husband must pay the money borrowed: but not if it be for apparel beyond her degree; for that is not within the general authority. And the books 34 Ed. 1. Det. 163., and 14 and 15 H. 7., there cited, are accordingly for other contracts of the wife upon the like supposition. If the wife buy wheat which comes to the husband's profit, this shall charge the husband, if the declaration be that husband by his wife had received so much to his profit. [And so, in case of a servant, 2 R. 2. Statham 65., he counted that the defendant bought of him forty sheep by one H., his servant, for 100*s*., which came to his use; and the declaration held good.] Which cases are put upon a presumption or supposition of a general authority which the wife had; otherwise they are clearly no law: but they extend to other contracts of the wife which come to the use of the husband as well as to those for necessaries or herself. So that I take it clearly Martin's opinion (which is the only authority from our printed books that hath been insisted on) if you will enforce it beyond the letter, to extend where the wife hath no consent, or general authority from the husband, is not law; and if you admit she had such an authority from her husband, it is good law,—but not to their purpose who cited it. As for the cases which have been cited of Sir Henry Compton; the record of that case is not produced; *et quod non lego non credo;* though it were true as it is cited, it is not material for the husband's assent, *a disagreement* was not mentioned in that case.

the house, hath also a *general authority* to buy necessaries for the family and for herself; (*s*) and if she borrow money, and bestow it upon necessary apparel, the husband must repay it. (*t*)

But as for authorities positive on the defendant's part; it goes for a rule in law that the contract of a feme covert cannot bind her husband, unless she have an authority precedent, or an assent subsequent. The books have been cited to prove this maxim: 34 Ed. 1. det. 163.,—2 R. 2. Br. Contract 41.,—

The contract of a feme covert cannot bind her husband, unless she have an authority precedent, or an assent subsequent.

(*s*) So Lord Ellenborough in Waithman *v.* Wakefield, 1 Campbell 120.—"When living with her husband, he is liable to any extent for goods he permits her to receive;—she is considered as his agent."

(*t*) The dictum of Parker, C. J., reported without any limitation in Earle *v.* Peale, 1 Salk. 387. is against this position; and the incorrect statement of Bridgman's argument in 1 Keble 447., where the discussion of the case in 11 H. 6. 30. is disposed of in eight confused lines, may have laid the foundation for doctrines different from those which the genuine text here seems to warrant. See Pre. in Ch. 503. and 2 Eq. Ca. Ab. 135. 1 P. W. 483. 1 Fonbl. 91. See also 1 Keb. 364. 389. 1 Siderf. 114—124. Bacon Ab. Baron and Feme H. note by the Editor. It is observable that the position is not adopted in Comyn's Digest tit. Baron and Feme. (Q)

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13 R. 2. Account 50.,—14 H. 7. det. 160.,—21 H. 7. 40.,—20 H. 6. 22. by Newton Chief Justice,—F. N. B. 62. Some of which extend to contracts of the wife for corn, bread, or other necessaries for the husband's profit, or expended in the household, or to keep his house; and Fitzh. N. B. 120., after all these authorities, concludes expressly, "that the husband shall be charged in debt by the contract of the wife, *s'il done authority, a sa feme d'achater et vender purluy; auterment nient*,"—If he give her authority;—*otherwise not*. All which cases I take to be express authority, and in the point; for they prove the general rule, that the wife's contract shall not bind the husband. [So C. Com. 112. She is disabled to contract with any, without the consent of the husband.] And, if the plaintiff will have an exception out of this general rule, by distinctions between contracts for necessaries for her person and contracts for her family, *onus probandi* lies upon him; otherwise, *quod generaliter dictum* without an exception must be *generaliter intelligendum;* and they stand for so many authorities in the point.

The case of Sir Nicholas Pointz, 7 Eliz. 234., seems to me (notwithstanding all that hath been said) more than a bare authority.—Debt was brought by the executors of Wheeler against Sir Nicholas Pointz; and declared upon an *emisset* of silks and velvet; upon a *non detinet* pleaded, upon evidence it appeared, that the Lady Pointz without the assent, command, or will of the husband, bought the wares for her apparel. The mercer knew she was a feme covert, and delivered the wares to her tailor upon credit. Sir Nicholas paid the tailor for making them and other clothes for himself; and after the tailor required money for the mercer, which he refused to pay. Upon this evidence, the defendant would have demurred: but the Jury was charged, and at their return the plaintiff was nonsuited; and the jury affirmed that they would also have given their verdict against the plaintiff.—*Tamen multum dubitavi inde*, saith Dyer. What was this doubt? Not whether necessaries or not; there was nothing of that in the case: silks and velvets are not unfit for a lady. Nor whether the contract of the wife could charge the husband without his consent; for nothing was touched of that in the case, and so not within the *inde dubitavit*. But the doubt was whether this payment by the husband to the tailor, who made the clothes of those wares taken up of the mercer, was not an *assent* of the husband to the contract with the mercer for the things themselves. But it was taken for granted by both one and the other as undeniable, that the action would not lie if there were no as-

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sent at all of the husband in the case; otherwise that point, whether assent to pay the tailor were an assent to pay the mercer, would not have come into the question.

It hath been urged that the practice for these last twenty years hath been, that the mercer shall recover in such cases; and that they, before whom it was adjudged, got their knowledge in the best of times, though unhappily they came to be judges in the worst.

True force of the precedents in the time of the commonwealth.

First, Admit the practice to have been so: they must remember that the coercive power, first as the stat. 16 Car. was expounded; and after that all power of the ecclesiastical courts, (root and branch) were then taken away; and so *necessity* made it more excusable in those judges, if, where they found no remedy, they made one; especially when there was not then nor like to be any legal parliament, consisting of a King and two houses of parliament, to have by a new act of parliament supplied the defect. It was upon the same ground they allowed suits for legacies at the common law; and that upon an elegit they adjudged the sheriff might extend ecclesiastical tithes; which was contrary to the common law before, as you may see F. N. B. 266. C. m. ch. 4. 24 Car. B. R. Rot. 78. Harwood and Payton's case. But the reason in both cases, and so openly pronounced, was because the bishops and ecclesiastical courts were taken away. It was upon the same reason, that within this twenty years the privileges of peers were taken away, and they made subject to arrests and burning in the hand; because the peers were excluded the parliament. Will you allow these opinions to be law now, because of the practice then? In this case of alimony, the opinion of a common law remedy, even in those times, was so unsatisfactory, that by a special ordinance of parliament they gave jurisdiction to the Chancery in such cases.

In the time of the commonwealth jurisdiction was given to the Court of Chancery in cases of alimony.

The authority of *Nisi Prius* and Westminster Hall decisions distinguished.

But, secondly, I must distinguish between the practice of Guildhall and Westminster Hall, even in those times. It was indeed the practice of Guildhall for some time, where it was made *quæstio facti, non juris;* and the practice in some cases became a grievance, whilst the business was bandied between the wife, the mercer, and the jury (who were tradesmen). But was there in that time in Westminster Hall any judgment upon demurrer, or special verdict, or any other proceeding, where the point of law came judicially before them? I know it in my own experience, in that time diverse were advised to procure special verdicts, or to demur upon the evidence, that the matter might be determined at Westminster Hall; so little did the authority of the practice at Guildhall prevail to settle

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(v) Harwood *v.* Paty or Payte, Sty. 161. 8. Hard. 65.

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the law in the point: and this very special verdict was found in that time.

Yet, I confess, these cases of charging the husband by the contract of the wife, or the master by the contract of the servant, for the most part consist more of matter of evidence than of law: wherein, lest there should be any mistake, I shall deliver my opinion.

In both cases of a servant, and wife, I lay it for a ground, they cannot charge the husband, or master, further than they have an authority precedent, or consent subsequent; but how far that authority or consent was given is the matter of fact, and proper for a jury.

In an action against J. S. upon a contract by his wife, a servant, for wares, or corn, &c. if it be given in evidence, that the wife or servant bought the like before upon trust, and J. S. hath paid for it, it is a presumptive evidence J. S. gave authority to this contract also; and the court will give direction accordingly; as in the case 27 Ass. pl. 5. But in case of a feme covert, I may go further; though there be no implied authority created by law, that she may take for necessaries for herself, as my brethren who argued for the plaintiff say; or for her family without her husband's consent; yet I may reasonably presume an authority in fact, if the wife take up necessaries for her family, or for herself, as part of her family; for it is usual that the wife hath administration and management of these household affairs. And the Scripture commands that the wife guide the house, 1 Tim. v. 14.; and in such a case, if an action be brought against the husband for goods so taken up by the wife for the family, it is in itself *primâ facie* a good evidence against the husband of an authority in fact given to the wife, that the wife took them up, and that they came to the use of the husband, if nothing be proved to the contrary. But it is but a presumptive, not a concluding or binding evidence; for, if the husband in such case shall prove that at that time he had a steward of his own appointment, who had authority to provide all things for the family, and usually did so; or that he prohibited his wife to take up, or that mercer to trust her; this takes off the presumptive evidence of an authority.

In an action against J. S. upon a contract by his wife or servant, for wares, &c. if it be given in evidence that the wife or servant bought the like before upon trust, and J. S. hath paid for it, it is a presumptive evidence J. S. gave authority to this contract also.

If the wife take up necessaries for her family, or for herself, as part of the family, an authority in fact from the husband may reasonably be presumed; for it is usual that the wife hath the management of the household affairs.

If an action be brought against the husband for goods taken up by the wife for the family, it is in itself *primâ facie* a good evidence against the husband, of an authority in fact given to the wife, that they came to the use of the husband, if nothing be proved to the contrary; as that his *steward* usually provided all things for the family, or that the wife was *forbidden* to take up the goods, or the mercer to deliver them.

If a common servant take up wares for the family, it is no presumptive evidence of an authority in fact from his master.

But in case of a servant at large, his taking up of wares, as I

conceive, is no such presumptive evidence of his authority: but you must either prove directly the authority given, or a presumption of it by some other act; as payment for what the servant had so taken up before, or coming to the use of the master by his assent, or the like; though a general declaration be good in such a case. D. et St. 138. 2 R. 2. Stathum; Contract 40.; 27 Ass. pl. 5.; 11 H. 4.; Contract 91.; 27 H. 7. 40. Compare them together.

If a feme covert live with her husband, and take up mercer's wares for herself or children, in an orderly ordinary sort, and not extravagantly; in an action against the husband, I should not doubt to direct the jury to find for the plaintiff, if nothing else be proved in the case; for I should presume that there was an authority given by the husband to the wife to do such things, as being things usually permitted to the wife's managery; and that it is not to be presumed that the wife would do it without the husband's privity or allowance. But if the wife shall leave her husband and family, and live of herself; or, as in our case, depart from her husband against his will, and take up wares from the mercer; this appearing in evidence, the presumption of fact ceaseth. In such case, I conceive a judge ought not to direct a jury to find for the plaintiff. But if by pleading, demurrer upon evidence, or special verdict, in any of the cases, it shall be acknowledged or found, as it is in our case, that the husband gave no allowance to the wife's contract, neither by command or authority precedent, nor by consent subsequent, there is no place left in presumption of an authority in fact, but judgment shall be given against the plaintiff.

When it appears in evidence that the wife hath left her husband and family against his will, and then takes up wares, the presumption of an authority in fact ceaseth.

Upon the whole, I conceive, in respect of the incapacity of the wife to contract without her husband;—her inability to retain what she contracted for;—the mischiefs and inconveniencies which would ensue, if she might, by her contract, charge her husband;—the congruity, fulness, and adequateness of the remedy in the ecclesiastical court;—the novelty of this way of supply of alimony, by taking up wares by the wife against the husband's will, not backed by former authority, or practice in good times; and the stream and current of the books and authorities in law, running encounter—that, therefore, the wife cannot, by the common law of the land, in any case, by way of *contract*, charge the husband for wares by her taken up, *nolens volens*, without his appointment, or direction precedent, or consent subsequent.

I am now come to consider of the objections on the plaintiff's part, against this opinion.

The first was this:—By the common law, the husband is bound to maintain his wife; and, therefore, maintenance being

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due by the common law, the common law which creates a duty will create a remedy by the common law.

This argument is grounded on a pure fallacy:—

First, for the proposition itself,—That by the common law the husband is bound to maintain the wife—it must be agreed that the husband is bound to maintain the wife. But this bond is not by the common law, but by a superior law; the law of God—of nature—of reason—the consent of all nations.

The common law allows that which the law of God, of nature, of reason appoint.

The common law, which is made up of the quintessence of reason, allows that which the law of God, of nature, of reason, appoints: but the lien, or duty itself, proceeds not from the common law.

Again, when you say, by the common law the husband is bound to maintain the wife; and, therefore, a remedy is given for it by the common law; I conceive by the word "bound" is meant, that the husband is, by the common law, compellable to maintain the wife. If you mean by the common law, as it excludes the ecclesiastical law of the land, that he is compellable, I deny the proposition; it is *petitio principii*. If you take in the ecclesiastical law in the proposition, you must take it also in the consequence; and then it is true, but nothing to your purpose.

I will make the very same argument in all ecclesiastical causes whatsoever. By the common law, tithes ought to be paid; churches ought to be repaired; wills ought to be proved; adultery ought to be punished:—therefore doth the common law give a remedy in these cases. This is neither good logic, nor good law. The truth is, the argument is a pure fallacy, and it hath at least *quatuor terminos* in it.

Secondly; but the great objection is that *ingens telum necessitatis* (*w*): all that is required, say they, is, *necessaries pro*

(*w*) In the imperfect argument is the following passage on this point: "As for the argument from necessity it holds not in this case. *Public* necessity, indeed, may take away private property from another in some cases; though, let me tell you, the arguments from necessity are the worst kinds of arguments. But private necessity cannot do it; for so a man might justify stealing of meat or corn, because else he should be starved."

The argument of an equity arising out of public necessities was in vain urged to Sir Orlando Bridgman, when Lord Keeper, in 1672, in the case of the Bankers, whom the stopping of exchequer payments deprived of funds to meet the demands of their customers. The proceedings in chancery do not appear to have been published in any of the printed reports. The case is thus noticed in a manuscript in the possession of the editor. "Mich. 1672. In a case touching the bankers, who prayed equity upon their great debts due from the King, which he had postponed by order of the privy council. Mr. Attorney cited this case, that in the time of E. 2., when

victu et vestitu—her husband denies it to her.—He cannot directly murder her by law;—but shall he starve her? She wants for the present; she may perish if she stay till she can have alimony decreed to her;—or—her husband is gone beyond seas, and hath not left her sufficient provision;—shall she take up on trust, or shall she starve? An infant is allowed to take up necessaries in such cases:—shall not the wife much more?

In answer to this, I must observe, those who have argued this case on the plaintiff's part have argued the case as if it were of an extreme invincible necessity—*et jam jam vincentibus undis*—the wife ready to famish for cold or hunger, and nothing required for her but *quoad esse*: whereas our case is only concerning conveniences; and not those neither generally, but suitable to her husband's degree. [So is "the record that the wares were necessary for her, and suitable to the degree of her husband." We have been taught at the University that το πρεπον that which is convenient, and αναγκαιον, that which is necessary,—are several topics.] Necessity and conveniency are in some degree opposite: though they are not contrary, they

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There was a war between the King and the Scots, where the enemies entered and destroyed the country in the north for divers years, so that the lords had no rents or services, and the lords brought *cessavits*, there was an injunction under the great seal in such case for the tenants. Keck cited a case, where there was a war between England and Denmark, the King of Denmark confiscated the goods of the English merchants there, and the debtor paid the debt there, and after the creditor sued for the same debt here; and an injunction was granted here; and Keck said this court is a court of state as well as of law." Skinner's MSS. fol. 255.

The case is thus noticed by Roger North: "Before that time there came some shrewd difficulties to be got over. One was an injunction to be granted in Chancery to stop suits at law against the bankers upon public necessity. The Lord Keeper Bridgman proved restive on this point." North's Examen, p. 88.

Lord Shaftesbury succeeded Sir Orlando Bridgman, and granted the injunctions: but within a short time dissolved them. See on this subject the Mayor of London *v.* Bennet, 1 C. R. 44. Mitford on Equity 74. n. (*p*), and the evidence of Sir S. Romilly before the Committee of the House of Commons on the usury laws, 1818. See also Basil *v* Atcheson, 4 Br. P. C. 502, 8vo. edit. as to abatements upon mortgage contracts in Ireland, "on account of rebellions, or other *public* calamities happening to the estates in mortgage." In Turnour's Treatise on the shutting of the Exchequer, in 1673, p. 53, &c. are some important ancient precedents on the inviolability of private rights and property in time of the extremest *public* danger. In p. 86. Turnour remarks, "that the civilians also do evermore chain up this voracious lyon of *necessity*, with the hardest and most strong restrictions." In p. 251. of this case of Manby *v.* Scott, Sir Orlando Bridgman approves of even a Judge yielding to a supposed inferential necessity in the application of legal remedies.

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are wholly disparate: so that in truth the arguments from extreme necessity and danger of life come not in our case.

But then take the case to be of such extreme necessity as they put it—the very same cases of necessity which they put of a wife, I can put of a child, that ought to be provided for by the father of clothes or diet.—It wants these necessaries, and a stranger provides them;—shall the father be charged? Yet he was by law bound to maintain his children. I will put my brother Twisden's own case. A child in the father's absence comes by a hurt; the wife sends for a surgeon, and cures it. Saith he, shall not the surgeon recover against the husband? If the law creates a contract, the law chargeth the husband in that case, upon the wife's sending for the surgeon; saith he, by the same reason it shall charge him, if the wife send for necessaries for herself?

A surgeon who is sent for by the wife or servant of A. B. to visit his sick child, can recover the bill only upon an express contract by A. B., or upon a presumption that A. B. gave his wife or servant authority to send for the surgeon.

I will answer this first by asking another question. Suppose the wife had not done this, but a servant had sent for a surgeon for the child;—shall the husband be charged to pay the surgeon, or not? If you say, he shall, then there is no difference in this case of necessity in the contract between the wife and the servant; and so it is not to the purpose. If you say the husband shall not be charged in that case; I say, by the same reason no more he shall where the wife sends for the surgeon; nor shall the child, as I conceive, be charged in such case.

But, to give a direct answer to the point: I hold, if the surgeon be sent for, and cure the child; whether he be sent for by the wife, or by a servant, it may, or may not, bind the husband as the circumstances may be. But where it binds him, it binds him not as upon an implied contract in law, as they who argue for the plaintiff would have our case to be; but upon a contract in fact, or so presumed that he gave authority to the surgeon to do the cure, or the wife or the servant to send for him. If the husband had been at home, and forbad the sending for the surgeon; or he had procured another surgeon; and this surgeon meddled with the child against his will;—shall this surgeon recover in an action upon the promise against him? Nothing less; which shews it be not an implied, but a contract in fact that binds the husband. And the same law it is, if the wife had been wounded; and a surgeon had been sent for to the wife herself. There is no doubt of it, such may be the circumstances of the case, that the husband or the father may be dealt withal, *criminaliter*, and severely punished, if he do not his duty, but be wilful and negligent in such cases; and so there may be *debitum ex delicto*. But you cannot in such cases make a debt *ex contractu*, to charge the husband, which is the point in question.

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So it is if the father goes beyond seas, and necessaries are taken up for the children: the father cannot be charged by way of contract, unless there be an authority given by him.

A difference hath been endeavoured to be made between the necessities of a wife, and of a child. If it be a child not able to get its living by reason of infancy, or impotency. I see no difference in reason: the man is bound by the law of God and men to maintain both wife and children; but yet there was more colour why the husband should be bound by the common law to maintain his child, than his wife; for that the wife had a remedy for maintenance by the ecclesiastical law, but the child had none at all. It is clear the father is not chargeable at the common law to maintain his children, otherwise than as the late statutes for the poor have provided, 43 Eliz. c. 2.

It is clear the father is not chargeable at the common law to maintain his children. (x)

But take all for granted that there is such an extreme necessity, and that, therefore, the common law must provide in such case for the wife; then, as I said before, the consequence is, (not that the wife might take upon trust, that depends upon a mercer's charity, whether he will lend upon trust; and is no more than to have a remedy to live upon the charity of her friends, till maintenance can be recovered from the husband, but it is a more natural consequence,) that the wife might in such case of necessity take her husband's clothes or goods, and pawn them; and his money, and lay it out: for the law of absolute and invincible necessity provides for the thing which is necessary, in specie; and gives not time to bring an action for it. And Bridgeman's case, cited by my brother out of Hobart, fol. 11, That the master of a ship, though he is no owner of the ship, may pawn the ship in case of necessity, would rather prove that she may pawn her husband's goods, than take of a stranger. But that very book saith, that power of impawning is by the civil law, and against our law; and so it is clear against law, that the wife should impawn her husband's goods, or take his money without his consent, to lay out for necessaries.

It is clearly against law that the wife, whatever may be her necessity, should impawn her husband's goods, or take money without his consent to lay out for necessaries.

But, lastly, the ecclesiastical law provides a remedy upon the complaint, as I said before. Let it appear she is his wife,

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(x) Except inasmuch as by the law of nature, which is part of the common law, maintenance is due to the child from the father, Raymond 500, cited 1 Bl. Comm, 1. b. c. 16; a principle recognized in decisions: see Bacon's maxims, Reg. 18. 1 Ld. Raym. 41. Waltham v. Sparkes. And under this sanction the Court of Chancery seems to have always held the father bound to support the child: but see the case of Mendez de Breta, 1 Ld. Raym. 699., and King v. Munday, cited in the marginal note to 43 El. c. 2. s. 7. 16 Viner, tit. Poor. (A)

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and maintenance is immediately allowed her, *mensatim* or *hebdomatim, pendente lite.*

As for the case of an infant, it hath been fully answered already. His case differs from that of a feme covert in these four particulars:—

1. The infant of the age of discretion is not a person disabled to contract as the wife is.

2. His actual contracts, if for unnecessaries, are but voidable.

3. He contracts for himself, and not for another.

4. He chargeth himself, and not another.

But a feme covert is disabled, and the contract of a person disabled is void; as the contract of a monk during the vocation, if he were not the prior or officer, is void. 11 H. 6. 30.

C. C. 30. b. 31. a. St. p. 35. 31 E. 3. Saver de def. 87.

In case of an idiot, though it hath been said (*y*) that an idiot may contract matrimony, yet that is not an evidence to prove that he may make a civil contract. But the ground of that contract, *conjunctio maris et fœminæ*, is by the law of nature; and the matrimonial contract founded upon it, is a spiritual contract, and in case of such natural defect of reason, is dispensed withal. But (*z*) I hold a civil contract, though for necessaries, by an idiot, after he is found by office to be an idiot, or a lunatic, after he is found by office to be a lunatic, is void. Nay, even in the case of an infant, though it be for necessaries, if he be of tender years, under the age of discretion, and under a guardian, who receives the profit of his estate, under favour of the opinion of others, I conceive he cannot be charged, by a contract, for taking up necessaries; and, therefore, I cannot approve of the late course which hath been taken by some, of arresting infants put out to school, for their boarding, or schooling, by their guardians or parents, as legal or justifiable. (*aa*) If then, under the age of discretion, they are not liable at all; if above that age, yet being infants, and put forth by those who had authority or command over them, I think

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(*y*) By stat. 15 G. 2. c. 30. the marriage of a lunatic is declared to be void.

(*z*) Treatise of Equity, B. I. c. 2. s. 1. and Mr. Fonblanque's Notes.

(*aa*) In Duncomb *v.* Tickridge, 94 Aleyn M. 24 Car. 1. B. R., published in 1688. it was attempted to charge an infant for diet, lodging, and apparel, although the contract was made on behalf of his mother. But Roll decided, that if another undertakes to pay for an infant's boarding this express agreement takes away the contract to be implied when the infant comes to a stranger to board. In Bainbridge *v.* Pickering, 2 Bl. Rep. 1325. it was decided that if an infant lives with a parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessaries of life, the child cannot bind herself to a stranger, even for what otherwise might be allowed as necessaries.

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they shall not be liable upon a contract, supposed in law to be made by themselves, when there was an actual contract by their parents or guardians.

A feme covert is under a guardian, (her husband) who receives all the profits of her estate; and *therefore* she is disabled to *contract* for herself for necessaries.

Now a feme covert, if you will needs compare her case to an infant, though it is visibly different, she is *sub custode*, (they are the words of Bracton, lib. 5. vide C. C. 112.) *under a guardian;* and such a guardian, as receives all the profits of her estate; and, *therefore*, is disabled to contract for herself for necessaries.

The next objection is, that the ecclesiastical court gives not a sufficient remedy for the wife, for alimony; it reaches not to the husband's goods or lands: they cannot grant a sequestration; if he will lie in prison, he renders the suit fruitless. And the statute of 21 Jac. c. 24. takes notice that divers persons of sufficiency have obstinately and wilfully chosen rather to live and die in prison than to make any satisfaction according to their abilities: and his imprisonment gives neither clothes nor victuals to the wife.

To this I answer, first, Process of excommunication and *excommunicato capiendo* have been the process in all causes ecclesiastical: if there hath been a defect in that process, it hath been so in all ages, and in all causes ecclesiastical, most of which are of as great concernment as this of alimony. And if there be a defect in it, it is to be remedied by act of parliament; and not to find out a new remedy for it at the common law; that were in the consequence to take away to the common law all ecclesiastical causes. A child hath a legacy left by the father's will: it is all its subsistence; the executor will be excommunicate, and lie in prison rather than pay it. Shall you therefore sue for a legacy at the common law?

But, secondly, You have here both excommunication and imprisonment; you bind his body, and you bind his soul. [Our own authors, Bracton and the rest, say he hath *leprum in animâ;* and "*cum excommunicato nec orare, nec loqui, nec palam nec abscondite, nec vesci, licet.*"—C. C. 133.]

He that knows former stories will find that excommunication was not accounted, *brutum fulmen.* And you bind his estate too; for an excommunicate person cannot sue for any thing due to him, or detained from him. Is your remedy at common law more? Sue for a debt at common law;—the defendant is refractory, and upon process before outlawry renders himself to prison, and will not appear. The new statute, 13 Car. 2., hath given some remedy to force an appearance;—had you any before?

As in this very case, the plaintiff sued him in the King's Bench; if the defendant had been refractory, and gone beyond

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seas, or kept himself out of the way of arrest,—had you any remedy upon his lands or goods? Certainly, if he will lie in prison rather than pay his wife, he will do so rather than pay the mercer. Well, but suppose you get an appearance, and so at length you reach his goods or lands,—can you hinder him from making away his goods and lands before judgment? If you do prevent him in this action, which extends only to maintenance past,—can you hinder him to do it for the future? And if he do,—what mercer will then trust the wife? If you say, it is not to be presumed he will sell his land, and divest himself of all, and—*exuere patriam*. I say so too: but it is the same reason to presume he will not lie under excommunication, and imprisonment, and lose the comforts of life, rather than allow a small pittance for his wife's maintenance.

And this is my third answer: as there are *quædam postulata* in all other sciences; so there are some grounds and principles upon which all laws are bottomed, and are not to be argued against. It is to be presumed every man loves himself; he will not pluck out both his own eyes, to pluck out one of his neighbours. This principle is the foundation of all external obedience to the laws, (I speak not of the conscience, or internal obedience to the laws.) That is the reason a man will not steal another man's horse, or break his house;—because he fears a greater hurt to himself by it than what he steals will be advantage. Or he will not kill another upon revenge,—because the fear of danger to his own person by hanging for it outweighs the sweetness of his revenge. This is the general case; and the laws, which are made *ad ea quæ frequentius accidunt*, go upon this ground; and are most just, although there may be some irregular persons who break these rules; and will kill another, though they are sure to hang for it. So in this case, it is not to be presumed, that the husband will lie in perpetual prison, *sub salvâ et arctâ custodiâ*, without bail, (as he must who is imprisoned upon an *excommunicato capiendo*;) and be debarred *a communione fidelium*; and not be able to bring an action to recover his rights, or rents detained from him; nor to have Christian sepulture; all which are punishments of one who lives and dies excommunicate. I say, it is "not" (*bb*) to be presumed that the husband will incur all these rather than allow his wife a competent maintenance out of his estate; and deprive himself of the comfort of his life, and residue of his estate, rather than allow her a small share of it, for her necessary support, which the laws of God and man, and his own solemn vows at his marriage, obliged him to.

(*bb*) "*Not*" has been inserted in this place.

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O but, say they, it is not to be presumed, that the husband will not be refractory, and lie in prison; for the stat. of 21 Jac. takes notice some will do it.

I answer, that statute says only *some* will lie in prison, not the greater part; and though it takes notice, that in some cases the fact may be against the presumption of law; yet it alters not the rule upon the presumption of law. That very law leaves the imprisonment to be a sufficient satisfaction during the life of the party imprisoned; which it is not, otherwise than as it presumes a man will pay his debts rather than lie in prison: but the act provides only after his death for a new execution. A collateral warranty binds upon a presumption in law, that the ancestor will not bar his heir by his warranty," but he will leave him as good an advancement. The statute of Gloucester took notice, " some tenants by the courtesy, without leaving assets, would bind their heirs by their warranty; and provides against it;—doth this take away the presumption of law in case of collateral warranty by tenant in dower, or other ancestor? [If a man should be attainted of felony, or treason,—what remedy hath the wife for maintenance, or the creditor for the debt due to him? And yet there hath been instances, that a man hath confessed a felony to avoid payment of his debts;—shall this take away the presumption of law, that a man will pay his debts, rather than be condemned to die?] To deny the force of presumptions of law in such cases is *negare principia*, and to overthrow all laws.

A collateral warranty binds, upon a presumption in law, that the ancestor will not bar his heir by his warranty, but he will leave him as good an advancement.

There is one more great objection, that is,—if in this case the husband cannot be charged by the contract of the wife, for necessaries taken up for herself from the mercer without his consent, then the husband may be charged in an action of trover and conversion; for the contract being void, the mercer ought to have his wares again, or satisfaction for them; *et frustra directè prohibetur, quod ex obliquo fieri potest.*

To this I give a double answer:

First, I conceive no action of trover and conversion will lie against the husband and wife in this case. It had been long a *quære*, whether an action of trover and conversion will lie where there was a lawful possession by bailment, because of the variance between the action, which was a trover, and the evidence which was a bailment. This was not settled till Isaacs and Clerk's case, Trin. 11 Jac. B. R. Rot. 110., Moor Rep. 841., when it was adjudged upon a special verdict it was good enough; for the trover, or bailment, are not the cause of the action, but the conversion; and therefore, if I deliver goods to another to keep, or to redeliver upon request; if upon request he refuse, an action of trover and conversion

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will lie. So, in case they be given in pledge, or upon condition, and the pledge be redeemed, or the condition performed, upon demand and refusal an action of trover and conversion will lie. Nay, suppose a feme covert, as feme sole, or not known to be a feme covert, takes up wares of a mercer, or goods for the use of her family, her husband not agreeing to it; in this case an action of the case lies for the deceit; and peradventure (I say *peradventure* only, for that comes not now in question,) an action lies of trover and conversion; for the contract was void as a contract, and there was *ignorantia facti*. Moor 538., Tompson and Gardiner. And in all those cases, the state of the case, in point of fact, was altered from what it was, or was understood (by the bailor) to be at the time of the bailment, or delivery of the goods. But when the mercer delivers goods to the wife, knowing her then to be a feme covert (as it appears by the verdict in our case, he did, the husband having prohibited him to trust her) to this very intent that she should make use of them; this I take to be a gift in law; for the owner intended to transfer his property, and that the wares should be converted to the defendant's use. And though it was a void contract, and the mercer intended to sell them, and not to give them, yet still the property is altered by his consent; and his ignorance is not *ignorantia facti*, but *juris*; which excuseth him not. And no action of trover and conversion will lie in the case; for an action of trover and conversion supposeth a wrong done; and here is no wrong done: but that which the wife did in receiving the goods, and in the conversion of them, was by the consent of the mercer, who did know the state of the fact, that she was a feme covert; and is presumed to know the law, that she could not contract. I may resemble it to the cases at common law, 7 E. 3. 50., 10 Co. 53. [The lord demands a heriot; the heir delivers the best beast, in which he himself hath property in his own right, to the lord; this amounts to a gift.] (*c c*) A man puts clothes upon the image of a saint: he intended only to adorn it; yet because it was a gift in law, for so the law was then taken, he cannot take them away again; and his ignorance of the law shall not excuse him. 11 H. 4. 31. [The Wardens of the Friars Minors took away a young boy from his parents, and clothed him; or a man takes away another man's wife, and apparels her: the father or husband shall take them

Gifts in law.

An action of trover and conversion supposeth a wrong done.

Voluntary payments.

(*cc*) In Brisbane v. Dacres 5 Taunt. 146. Sir V. Gibbs C. J. says, "There is a case of money paid under distress, for standings in a market; though the party had no right to distrain, the money could not be recovered back."

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away with the apparel; it is a gift in law.] And our case differs, as I said before, from those other cases of bailment. If goods be delivered to keep, or to be redelivered upon request, and refusal to deliver them, the state of the fact is altered; the keeping them was to secure the discharge of the pledge, or performance of the condition. Where the goods are pawned, or the discovery that the woman to whom the wares were delivered was covert, whereas he took her to be sole, alters the state of the fact between the time of the bailment, and the action brought. If an infant of the age of discretion takes up wares which are not necessary, this is but a voidable contract: but if he will avoid it in part, it shall be avoided in the whole. And in that case, peradventure the case being altered, after the bailment of the goods, an action of trover and conversion will lie: but here there is no alteration of the case from what it was at the time of the bailment. The mercer knew at first she was a feme covert, and yet consented to the alteration of the property of the goods.

Trover and conversion.

But, secondly, admit an action of trover and conversion did lie in our case; yet the mischief is not so great as it will be if the mercer can bring an action of debt, or *indeb. ass.;* for the reason is not the same where the action ariseth only *ex contractu* of the wife against the husband, as in our case; and where it ariseth *ex delicto* of the wife, as it does in trover and conversion. Where the action of trover and conversion is against the husband and wife, the husband's name is put in only for conformity to the law. If the wife die before judgment, the action is gone; when judgment is given, it is against both; the wife may be imprisoned, and taken in execution as well as the husband: and if she survive, she shall be charged alone, and his executors free. And therefore in all reason, where she charges herself as well as her husband, she will be more cautious than she will be when she charges her husband only, and not herself.

Where the action of trover and conversion is against the husband and wife, the husband's name is put in only for conformity to the law. If the wife die before judgment, the action is gone; when judgment is given, it is against both; the wife may be imprisoned, and taken in execution as well as the husband; and if she survive, she shall be charged alone; and his executors shall be free.

But there is another difference between the cases. Admit the mercer can charge both husband and wife in an action of trover, and out of partiality of affection will charge the husband only for the wares; yet he can do it but once. If the mercer once charge the husband and wife in trover and conversion, for wares delivered to the wife without the husband's

If a mercer once charge the husband and wife in trover and conversion for wares delivered to the wife without the husband's consent, and again deliver to her wares without such consent, he shall bring another action of trover and conversion against the husband, because the second delivery will be an evidence of fraud and combination between the mercer and the wife to charge the husband whom the mercer knew not to be consenting.

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consent; if he do it a second time, it is an argument of the mercer's consent to have it so. And so it is no tortious act in the wife to take the warea from the mercer: but an evidence of fraud and combination between the mercer and the wife to charge the husband, whom the mercer knew not to be consenting. And no action of trover and conversion will lie, if the conversion was not tortious, being by the mercer's consent: but if the wife may take up goods from the mercer, and by an implied contract in law charge her husband, the same law that gives her power once, in case of necessity, will do it always in case of like necessity pretended; so that admitting that a trover and conversion would lie in this case; yet it follows not that the husband can be charged by this action upon an *assumpsit* grounded upon a contract.

The last objection is, that which was made by my brother Twisden. These wares were taken up in 1658, when the ecclesiastical courts were *de facto* taken away; and the act of 12 Car. 2. takes notice of the clause of 16 Car. 1., whereupon doubt was made that all ordinary power of coercion and proceedings in causes ecclesiastical were taken away; and provides against it; and therefore there being no remedy in the ecclesiastical courts when these wares were taken up, there ought to be a resort to the common law.

But this receives a clear answer; for the law was the same then that it is now, only force and tyranny had stopped the voice of it, that it could not be heard. The ecclesiastical courts *de jure* had then their existence, though there was an obstruction in the administration of that justice there. And the act of 13 Car. 2. creates no new law: but it is declarative only that the act of 16 Car. 1. neither doth nor shall (so are the words) take away the ordinary power or authority, but that they may exercise all manner of ecclesiastical jurisdiction; and all censures and coercion, appertaining and belonging to the same, in as ample manner and form as they did or might lawfully have done before the making of that act of 16 Car. So that in the eye of the law this power was then in being.

In cases that had a determination before his Majesty's happy return, the act for confirmation of judicial proceedings hath its operation, and supplies the defect of legal power. In other cases not provided for by that act, we are to consider, not what was practised then as law, but what, in truth, was law. If a legacy be due by a will made in those times, you must sue for it now in the ecclesiastical court, and not at common law; and so in this case we are now to judge according to what the law is at the time of the judgment, and not according to the misinterpretation of it, in the times when this action was brought.

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So that having (as I conceive) answered all the objections made on the plaintiff's part; upon the whole, I do conclude, in respect of the incapacity of the wife to contract, without her husband;—her inability to retain what she contracted for;—the mischiefs and inconveniences which would ensue, if she might by her contract charge the husband;—the congruity, fulness, and adequateness of the remedy in the ecclesiastical court;—the novelty of this way of supply of alimony, by taking up wares by the wife against the husband's will, not backed by former authority or practice in good times;—and the stream and current of the books and authorities in law running encounter; that, therefore, the wife cannot by the common law of the land, in any case, by way of contract, charge the husband for wares by her taken up, *nolens volens*, without his appointment or direction precedent, or subsequent consent. And so, my advice is, that judgment ought to be given for the defendant.

Justice Hyde objected against the verdict, that it appears not what the wares were for which the *indebitatus assumpsit* was brought; nor whether it were for apparel, nor *how* it was for necessaries; whereas what is necessary and what is convenient is to be tried by Jury.

But the difference is between a special pleading, there what is necessary, or convenient, or reasonable, is to appear to the Court.

Fawcett against Barber in an action of detinue for a horse —the defendant justifies for an estray, and the detainer of him for his pasturage,—he ought to set forth in certain what it is reasonably worth. So in Pilkington's case, 5 Co. he that pleads tender of amends before the cattle impounded, must shew what amends he tendered, that the court might judge of the reasonableness of it.—So, 4 Co. 27. if the question come, whether a fine for a copyhold be reasonable, it shall be determined by the opinion of the Judges before whom the matter depends, either upon demurrer or upon evidence to a jury upon confession or proof of the annual value of the land, whether the fine demanded were reasonable or not.

Cro. Eliz. 170.

Co. Entr. 603.

But upon the general issue pleaded, as here *non assumpsit*, the particulars are but matter of evidence, and need not be set forth in the declaration; for the point of the action is, whether the defendant *indebitatus* did assume; and in the evidence, what the wares were, or whether necessary or no, comes in but obliquely; and it shall be supposed that the particulars appeared in proof, and that they were necessary. The Court directed the jury; and if it had been otherwise, the defendant might have demurred upon the evidence, and we are to judge

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only of what the jury doubted, which was, not whether the wares were necessary, but being necessary whether being taken up without the husband's consent, the husband was in law bound by the wife's contract.

In page 31 of No. 57 of the manuscripts, there is what in the title is stated to be an "imperfect argument, of use only as to the contracts *by servants* not touched in the other argument delivered in the Exchequer Chamber." It is obviously a sketch by Sir Orlando Bridgman himself; and it seems proper to be published, so far as to introduce the analogy between the relations of husband and wife, and those of master and servant.

Harg. MSS. No. 57, fol. 82.

"For the matter in law I am, by the consent (*dd*) of my brethren of the Common Bench and Exchequer, for whose advice this case was adjourned hither out of the King's Bench, to deliver our concurrent opinions upon the first and general point wherein we do all agree in the matter of law against the plaintiffs.

"And, therefore, the two other points not spoken to at the bar, and being to be argued only upon admittance of the law to be contrary to that wherein we do agree, no opinion hath been given therein by my brethren. Nor shall I say any thing of myself *sententialiter;* but only that it is not to be taken for granted that those points of the husband, his forbidding the plaintiffs to trust his wife, or concerning the allowing of her maintenance after her departure against the husband's will, are over-ruled. There is that in them which might deserve our present consideration, if we had not been unanimous in the other point; for as to the first, the forbidding the plaintiffs to trust the defendant's wife, if necessity did make the wife's contract for apparel good against the husband, yet there appears no necessity that this contract must be made with the plaintiffs: and, therefore, it is to be considered, whether the defendant's forbidding them to trust her doth not stand good as a prohibition, unless it were found by the verdict that she could not take it up of any other persons (which is not found); for perhaps he might have just cause to except against them for unreasonable prices, or bad wares, or ill usage formerly. If my servant had been formerly employed to buy mercery wares, or

If a servant formerly employed to buy wares for the use of a family, buy still, continuing in the family, the master is bound by it: but if an express prohibition be given to the tradesman not to sell to that servant, the power which he had in law ceaseth.

(*dd*) The other Judges themselves delivered their opinion in this case contrary to this apparent expectation of Sir Orlando Bridgman.

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other things, for the use of my family, if he buy still (continuing my servant) I am bound by it: but if I prohibit the mercer to sell to him, the power which he had in law ceaseth, if he trust him contrary to this express prohibition. And it shall not bind me; for *aliud est prohibere, aliud non dedicere;* [8 E. 4. 11. Br. Contract, 24. It binds not, if the servant after a countermand to him given, do buy. By the same reason, if the mercer, after a countermand to him given do sell.] I say this may be urged: but yet it seems to me in our case of a feme covert, that this point falls into the main question; for if the law will create a debt upon the wife's taking up goods against the husband's will, to charge the husband, the prohibition precedent, I think, cannot alter the law. And it differs from the case of a servant; for a servant's contract is supposed good upon an authority given by the master himself, which may be recalled. But the wife, admitting the law to be with the plaintiffs upon the main point, is supposed to act upon an authority and contract made by law, which the act of the party cannot prevent.

A servant's contract is supposed to be good upon an authority given by the master himself, which may be recalled.

"But we do all agree upon the main and general point (laying aside the consideration of all other circumstances in the case) that if the husband do not allow to his wife necessaries, as apparel, or the like, and she take them up upon trust, the husband is not chargeable to pay for the same. Fol. 35.

"I shall very briefly deliver the reasons thereof, and incidentally answer the reasons to the contrary.

"The reasons are these: the common law of the land allows no contracts made by the wife to bind the husband, when his consent was not had to it, either precedent or subsequent. But, 2dly, the ecclesiastical law, (which is also part of the common law in a larger sense) though it extend not to make good such a contract, for contracts are of temporal conusance, yet it provides a remedy for the wife, when the husband will not allow her necessaries.

"For the first; by supposition of law the wife ought to be '*sub potestate viri et regimine, et gubernatione viri;*' they are words of the writ of *supplicavit*, F. N. B. 80 (*ee*) and she is not *sui juris*. If she make a contract or agreement without her husband, if it should be good in law it must charge the husband; and the law thinks it not reasonable that he should be charged with any contract of his wife, without his own consent. Our books are full in this point, 13 R. 2. Ass. 50.; 2 R. 2. Br. Cont. 40.; 34 E. 1.; Det. 163.; 21 H. 7. 40.; and 14 H. 7. Det. 160.; 20 H. 6. 22. per Newton; v. n. Br. 62. (*ff*).

(*ee*) Query, F. N. B. 239.

(*ff*) "Note, that sometimes a man shall be charged upon a contract by his wife, bailiff, servant or such

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Which books prove that the contract of the wife, though for corn, bread, or other necessaries, which come for the profit of the husband, or are expended in the household, or to keep his house, (as the books of 21 H. 7. 40., and v. n. Br. 62. are) shall not bind the husband, unless he had given a general command precedent, or afterwards assented to it, as in case of a servant. And F. N. B. 120. G. after all these authorities, concludes expressly in case of a feme covert, as in case of a servant, the husband shall not be charged by the contract of the wife, if he give her authority to buy and sell for him; *auterment nient.*

"Nay, the old books were so clear on this point, that it was long a doubt, if the wife bought things, if they came to the use of the family, but, upon the emption or contract, it was not *expressed* that they were bought to the use of the husband,—whether it was good, though the husband did afterwards assent, as supposing it a void contract, *ab initio*. So is 21 H. 7. 4., and 20 H. 6. 22., and v. n. Br. makes a query of it (*gg*). But the resolution of Tatham's case, 27 H. 8. 125. that the agreement of the husband after makes it in law an agreement with him, settles that doubt; and so it is also agreed in Taylor and Pratt's case. In 29, 30 Eliz. B. R. 3 Cro. 62., an agreement or gift by the wife is good, if the husband assent to it. So in case of a servant, Dr. and St. 137., if he makes a contract in his master's name, the contract shall not bind his master, unless it were by his master's commandment, or that it came to his master's use by his assent; which proves, that if they came to his use, and not by his assent, it binds not.

"But though the law make the wife's contract good upon the husband's assent to it; yet it makes it good, not as a contract or gift of the wife, but as the contract, gift, or agreement, of the husband. And so it is said expressly by Fitzherbert, in Tatham's case, 27 H. 8. fol. 26.; for to say truly, what the wife acts in such cases, is not properly as a wife, but as a servant; and our books, which put the case of a contract by a feme covert, at the same time put as parallels the case of a servant or monk, who is but as a servant under his sovereign.

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other person. As when my bailiff buys sheep or other things for my use, I must pay that debt; and the plaintiff is not bound to shew in his declaration that the bailiff had authority to buy for me; but I am liable, inasmuch as the things bought came to my use. D. 3 T. R. 2.

"But according to Newton, if my servant or wife buy any thing, I am not liable, although this comes to my use afterwards. But if the thing were originally contracted for to my use, then I shall be liable if it comes to my use. Quære of this difference. H. 20. H. 6."

La vieux Natura Brevium, 61. a. 62. b. Ed. 1572.

(*g g*) See note (*f f*) above.

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" And this affords me another reason why the wife's contract for necessaries for herself binds not her husband; for what she does as a contractor, she does as a servant. If a contract be made by a servant which binds the master, whether he consented before it is done, or after, yet the declaration in debt, or in an action of the case upon an *assumpsit* against the master, must be upon a supposal of the contract to have been made by the master himself. And if, in the action against the master, the declaration were laid, *secundum veritatem facti*, that the servant contracted for the wares or goods, it were naught; for it is the master's command or assent that gives this influence to it, and makes it his contract.

Fol. 35. b. If a contract be made by a servant which binds the master, yet the declaration in debt, or in action of the case upon an *assumpsit* against the master, must be upon a supposal of the contract to have been made by the master himself, whether he consented before it was done, or after.

" One brought an action of debt against another for wool sold to him by the plaintiff's servant; the defendant offered to wage his law; the plaintiff refused, because the contract was made by his servant, and in this action he had declared that the servant sold the wool. Green, the judge, who gave the rule, said, ' We intend you counted, as by law you ought, that you yourself that were the plaintiff sold the goods; for otherwise you have no cause of action against the defendant, but an action of account against your own servant: and, therefore, because the plaintiff refused the law, judgment was given against him.'—2 R. 2. Statham.

" And as it is in the case of a contract by a servant, so it is in case of a contract by the wife, which binds the husband, either in respect of his command precedent, or subsequent assent to it. If an action be brought by or against the husband upon such a contract, the declaration must be of a sale by or to the husband; or an *assumpsit* by or to the husband; and so it is in our principal case here for necessaries for the wife. The declaration is,—that the wares were sold to the husband, and that the husband promised to pay the plaintiff. If the declaration were *secundum rei veritatem*, that the wife bought the goods for necessaries, and so declared against the husband as chargeable by law, it were an ill declaration. That is the express case of 34 E. 1. Det. 163. cited before to other purposes. In debt, the plaintiff counted that the defendant's wife bought of him 10 quarters of wheat, which came to the defendant's profit: and upon demurrer the count was adjudged bad; for the wife shall not be charged by it, *nec per consequentiam* the husband; these are the words of the book. It is true, that book goes farther,—that if the plaintiff had declared that the defendant, by Alice his wife, had received so much to his profit, he should have recovered; and that 14 H. 7. was agreed accordingly before,

If an action be brought by or against the husband upon a contract by his wife, which binds the husband, either in respect of his command precedent, or subsequent assent to it, the declaration must be of a sale *by or to* the husband.

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Fitzh. Det. 160. But that book is not to be understood as if the delivery of corn to the wife to the husband's profit should bind him without his consent; for that is expressly contrary both to the law, as it appears by the authorities which have been cited, and is acknowledged by all persons who have argued this case on the plaintiff's side, and distinguish between necessaries received by the wife for her person, and things which come to the use of the family; and is expressly contrary to that book, 14 H. 7. Det. 160. there cited. But upon considering the cases it will appear that the weight of the case lies upon this:— that the wife's taking up the wheat, if the husband consent and receive it, binds him. But you must not declare in that case upon the contract of the wife, but upon the contract of the husband; or if you mention the wife, yet still you must declare that the husband contracted and received it by the hands of his wife to his profit, by the husband's general command precedent, or assent subsequent; it coming to his profit, makes it a good contract; and so is that case, Det. 160., to which it refers, and refers upon that point only. But the husband's consenting or not consenting appears not, which is to be mentioned in the declaration, it being part of the matter of evidence after issue joined, whether it was his consent or not; and also, if the servant or wife do make a contract for that which comes to the profit of the husband, it shall be presumed, *primâ facie*, that there was either the command, or allowance of the husband or master; for no one is presumed to do an unjust thing. But still it is but *presumptio donec probetur in contrarium*: 2 R. 2. Statham cited by Kitchin (*hh*).

"Now, the use I make of the cases before cited is this:—If the wife might bind the husband by law for necessaries for herself, without his command or consent, the same law which created that right and interest to the wife would also have enabled the plaintiff to declare *secundum veritatem facti*, according to the truth, that the wife took up the goods for necessaries for herself, and so have charged the husband. But the law not allowing any such declaration, but only to declare, as in the case of a servant; so in the case of a wife there must be a command precedent, or assent subsequent, if you will charge the husband by the wife's contract, though for necessaries fit.

"It were a strange instance, and without a parallel, that the wife might charge and fetter her husband by her contract against his will, and slip her own neck out of the collar. But

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(*hh*) On Court Leets, 186. b.

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the law makes no difference, it appears by these cases, between the contract of a servant and of a wife, or between a wife where she contracts for herself for necessaries, and where she contracts otherwise for herself. The declaration must still suppose the contract to be made by the husband or master; and therefore, as in the other cases, the ground in law, why it is laid to be the husband or master's contract, is his command, or assent, for otherwise it were not his contract; so it must be in this case also.

"To say the truth, these cases of contracts by servants or femes covert consist more of a matter of evidence than of law. If a servant (who is a servant *conus*) and used to take up wares on trust, takes up wares, and they come to the use of the family, in an action against the master, the Judge will give direction to find for the plaintiff; for his being a known servant and used to take up wares upon trust, and the goods coming to the use of the family, it shall be presumed that he had authority from his master, or that his master consented to it, and that it was bought to his master's use and in his master's name. But if upon pleading, a verdict, or direct evidence, it shall appear that the servant had no such power to take up on trust, nor that the master assented, there the law will lie against the plaintiff; for the servant's power is not further than the authority given him. If it be only to buy with ready money, he cannot go on trust." Fol. 37. b.

This imperfect argument concludes in the following words: "It is safest to follow the steps of our ancestors; and, though our law do not allow so extravagant a power as this to the wives, yet there is so much provision, care, and indulgence for them by the laws, and the genius, custom, and constitution of the people, which gives them more freedom of converse than in other nations, where the wife hath a peculiar estate, that it hath been called the women's island; that it was no less than a proverb, that if a bridge were made over the sea, all the wives in Europe would come hither; and I trust that fair character will still be given of this nation.

"So that I have done with the case; the ecclesiastical law provides a remedy for the wife where the husband denies her necessary maintenance. The common law allows not the wife to do any thing by way of contract, which may charge her husband, without his consent; no authentic report, or record in any age or succession of time, hath or could be produced of such an action brought and maintained, till those troubles, and after the coercive power of the ecclesiastical courts taken away; and the inconvenience would be exceeding great if such a law should be now introduced; and therefore I con-

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ceive it best, *stare super vias antiquas*; and as well on behalf of my brethren of the Common Bench and Exchequer, as of myself, do advise my lords the Justices of the King's Bench to give judgment for the defendant."

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Hil. 14 and 15 Car. II. (*a*)

[An ancient custom in the City of London for the Mayor and Aldermen, with the assent of the Common Council, to make by-laws in order to enforce the execution of their other good customs, is good, if the by-laws are beneficial to the public, and consistent with the good faith upon which the Corporation of London is bound to act.

The act of Common Council to regulate old and new draperies in Blackwell Hall and Leadenhall is valid.]

BRIDGMAN, C.J.

Harg. MS. No. 56. fol. 22.

A writ of *habeas corpus* issued to the Mayor, Aldermen, and Sheriffs of London, to bring the body of Samuel Hitchins, *alias* Hutchins, before the Justices at Westminster, *die Veneris proxim. post Octab. Hilarii, teste* 28 Nov. 14 Car. 2. Sir John Robinson, Mayor, the Aldermen, and Sir Thomas Bludworth and William Turner, the Sheriffs, make this return:—

The custom in the city of London to make by-laws hath been allowed beyond the time of memory.

That London is, and time whereof the memory of man is not to the contrary, hath been, an ancient city; and that in the said city habetur, et a toto tempore prædicto habebatur consuetudo usitata et approbata, quod si aliquæ consuetudines in dictâ civitate obtinent et approb., in aliquâ parte difficiles et defectivæ existunt, seu existerunt, aut aliquâ in eâdem civitate de novo emergentia, ubi remedium prius non existet, seu existerit ordinatum, emendatione indigeant Maior et Aldermanni civitatis prædictæ tempore existentes

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(*a*) "Upon a *habeas corpus* for Hutchins, a special *bilaco* in London was returned with the body, and the court would not bail him; for there no precedents could be awarded; but he was bailed to a certain day *ad comparendum*; and so *de die in diem*." Harg. MSS. No. 55. fol. 153. This case is cited in Mr. Norton's argument against the claim of non-freemen to deal by wholesale within the jurisdiction of the city of London; *passim*, 1821. And in an enquiry into the elective franchise of the citizens of London by Mr. Schultzes, 1822.

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de assensu communiarum ejusdem civitatis, remedium congruum, bonæ fidei et rationi conforme, pro communi utilitate civium dictæ civitatis, et aliorum fidelium domini regis nunc et progenitorum suorum, ad eandem confluentium, apponere possint et potuerint et ordinare quoties et quando eis videbitur expedire. Dum tamen ordinatio hujusmodi domino regi nunc et progenitoribus suis, et populo suo utilis, et bonæ fidei et rationi consona sit.

And sets forth that the said custom, and all other their customs, authoritate parliamenti 7 E. 2., were ratified. And that in a common council, held secundum consuetudinem civitatis Londini in camerâ Guildaldi ejusdem civitatis, 4 die Decemb. anno domini regis nunc &c. 13, per Joannem Frederick, tunc Maiorem civitatis Londini prædicti, ac ejusdem civitatis tunc Aldermannos, de assensu communiarum ejusdem civitatis in eodem communi consilio assemblat. exist., secundum prædictam consuetudinem civitatis præd. ordinat., enactitat. et stabilitat. fuit, modo et formâ prout in Anglicanis verbis hic sequitur, viz. An act for the better regulating of the old and new drapery in Blackwell Hall and Leadenhall, (and so sets forth the whole act in *hæc verba*, as it is in the print. (*b*)) And the return further sets forth that, before the writ came to their hands, Samuel Hut-

And ratified by act of parliament. 13 Car. 2. An act of the city was made to regulate the old and new drapery in Blackwell Hall and Leadenhall with penalties for disobedience; and authorising imprisonment of the offender if the penalty should not be paid. The defendant below was in custody under the said act of the city.

(*b*) In Maitland's History of London, p. 462. the act is printed at length, and dated 20 June 1678, which seems to be a mistake.

By a local act of parliament, 55 G. 3. 93., which recites "that Blackwell Hall was a market for cloths, and had been regulated by the acts of parliament of 4 and 5 P. and M. c. 5.; 39 Eliz. c. 20.; 8 and 9 W. 3. c. 9.; and 1 Geo. 1. st. 1. c. 15.; and *entirely discontinued* for many years; and that the Mayor and Commonalty and Citizens were desirous to provide convenient buildings for courts of justice upon the site thereof; therefore the said recited acts of parliament were repealed; and it was enacted that the said market, and the office of keeper thereof, and the tolls and profits of the same, and all the public and common uses and purposes to which the site of the said market, or any part thereof, were subject by virtue of the said acts of parliament, or by-law, prescription, or usage, or otherwise howsoever, should cease, and be utterly void, to all intents and purposes whatsoever."

Not only, also, has Blackwell Hall been disused for many years as a market and public store-room for cloths; but other objects of the act of Common Council, as the compelling factors to be admitted by the Court of Aldermen, and the subjecting the cloths to certain examination, have long been disregarded. Experience seems to prove that various restrictions, so strongly recommended by Sir Orlando Bridgman as necessary to the well being of the trade of the country, are useless.

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chins was taken in the city of London, and in prison under the custody of the Sheriffs, detained by virtue of an original bill of a plea of debt upon demand of 5*l.* against him, 19 Sept., 14 Car., in the King's court, held before Sir John Frederick their Maior, and the Aldermen, according to the custom of the city, at the suit of the Chamberlain, upon the said act of Common Council; and sets forth the tenor of the bill in *hæc verba*, wherein is set forth that *vigore et authoritate communis consilii præd. (int. al.) enactitat. et stabilitat. exist.*, That all broad cloths &c. shall be pitched and har-boured in Blackwell Hall and Leadenhall respectively, &c.; and that they shall be duly entered, and the duty and the hallage paid for the same, as in the act is mentioned, before they shall be removed; and sets forth the clause what commodities are to be pitched and har-boured at Blackwell Hall, and what commodities at Leadenhall,—commorantur donec inde intrat. visa et scrutat. sunt respectivè, et vendit. prout in actu prædicto dirigitur, vel permissa sunt asportari prout in actu præd. direct. et limit. exist; et hallagium sol. per eosdem ut ante dictum est. And that it was further enacted, that no person should be a broker, factor, or buyer in any of the halls aforesaid, unless he should be first approved and admitted by the court of the Lord Mayor and Aldermen, and had entered a recognisance in the King's court, &c.; and so recites both the clauses touching factors, and the clause for recovery of the pains and penalties forfeited and incurred by virtue of the said act of Common Council; and before the affirmation of the said original bill, *viz.* 21 Aug. anno regni regis nunc, &c. 14, vendebat personæ eidem querenti incognitæ in aulâ communiter vocat. Blackwell Hall, ut factor, 10 pannos latos et tempore venditionis nec ad aliquod tempus postea exist., inde approbat. et admissus per dictam curiam Mayor. et Aldermannum, licet prædictus defendens fuit residens infra hanc civitatem, scilicet in parochiâ præd. insuper 14 dies: viz. 20 dies ante talem venditionem, contra formam et effectum actus communis consilii præd., per quod actio accrevit to the plaintiff for the said 5*l.*, &c. sic causa præd., adhuc manet ibidem, in cur. præd. indeterminat.; et hæc est unica causa captionis et detentionis præd. SamuelHutchins in personâ sub custod. præd., quam una cum corpore ejusdem

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Samuel Hutchins ad diem et locum in brevi præd. mentionat. parat. habemus prout per breve illud nobis præcipitem.

Before I consider the matter of the return, there be several objections in my way, made against the form of it by my brethren who argued at the bench, whereupon they conclude that Hutchins the prisoner ought to be discharged.

I might give one general answer to most of them, that they are grounded upon these, or some of these suppositions:—First, That the case of the city of London is to be resembled to the cases of other inferior courts; Secondly, That the ordinances in acts of Common Council made by them are to be resembled to other by-laws; and, Thirdly, That the returns and pleadings upon a writ of *habeas corpus* are to be resembled to pleadings in other actions; which ground I cannot agree unto, as I shall shew anon. But I shall consider them severally.

1st obj.—My brother who first argued, objected,—that whereas they were commanded to return the body *una cum die et causa captionis*, the return is, *quod ante adventum istius brevis.* Hutchins was taken, without mentioning the day; and the teste is the 28th of November, returnable in Hilary Term.

Where a writ of *habeas corpus* runs "to return the body with the day and cause of the imprisonment," the actual day of the taking is seldom material, so that it lie before the serving of the writ. If it should be conceived to be material, the party may move for an amendment of the return; but it is no cause for discharging the party.

The return was just so in Wagoner's case; and is frequently so in other returns. The day when he was taken is seldom material, so it be *ante adventum brevis.* If it should be conceived material, the party may move for an amendment of it, and cause them to amend the return: but it is no cause to *discharge* (*c*) the party. And in this case, the cause of his imprisonment appears sufficiently, and certainly enough for the Court to discharge the party, or remand. Whether he were taken the first or second, or any other day of November is not material, but only that he was taken "*ante adventum brevis.*"

2d obj.—That a *capias* was the first process upon which Hutchins was taken, and there can be no arrest upon the first process in an inferior court.

This I shall answer anon, when I come to consider the record of the actions brought by the Chamberlain of London in the Court of the Mayor and Aldermen.

But whereas it was said that a by-law to prosecute by action and arrest is naught, as a by-law upon pain of imprisonment: I utterly deny it, as against all the precedents, whereof there are hundreds of actions of debt brought by the Chamberlain upon acts of Common Council, against the express resolution in the case of the Chamberlain of London; as that the appointment that the Chamberlain may bring an action of debt

5 Co. 64. Clark's case, Moor 411. A by-law to prosecute by action, and to arrest in order to enforce the remedy, is good.

(*c*) In the manuscript the word is "remand:" but the context seems to require, "discharge."

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was good, and allowable by law. It were strange a *capias* should lie here at Westminster in debt for an accompt, or pain in a court baron or inferior court; and yet not lie in London upon an action there.

But in case of a by-law or ordinance, the difference is apparent between imprisonment which is in *pœnam*, and is the end of the suit; and imprisonment in *custodiam* only, and to bring the party to answer. If a by-law or ordinance be made that, upon doing or omitting such an act, the party should be imprisoned, it is naught; for it is the end of the suit. The party hath no remedy to free himself from it; and, therefore, it cannot be done by a by-law. But where the by-law is a pain, or money mulct, for which debt will lie, the imprisonment is only to bring him to answer: he may help himself if he will by paying it, or putting in bail till the suit determined; if he lie in prison, it is to be presumed his own fault.

If a by-law be made that upon doing or omitting such an act, the party should be imprisoned, it is naught. For it is the end of the suit; the party hath no remedy to free himself from it, and therefore it cannot be done by a by-law. Where the by-law is a money mulct, for which debt will lie, and imprisonment on nonpayment, it is good, because the party may help himself if he will, by paying the money, or putting in bail.

3d obj.—The third objection was made upon the pleading the customs, that the *Mayor* and Aldermen, *time out of mind*, de assensu communiariorum, have made ordinances; whereas they were Mayor and Aldermen but within memory; and the time immemorial must be from the 1 R. 1. inclusive.

I answer, first, it is *returned* here that they were *Mayor* and Aldermen time out of mind, and so to be believed upon this return. Secondly, There was a Mayor 1 R. 1., though not of their choosing, and Aldermen; and it shall therefore be presumed to be so. The Register, which is our ancientest law-book, directs writs "*Maiori.*" And Glost. 6 E. 1. c. 12, 13. "*Maiori et Balivis.*" In Andrew de Vine's case, (*d*) in Henry the Sixth's time, and in all the returns which I have ever seen, the customs are set forth as here; and it is one thing to make a return upon a *habeas corpus*, and another to plead a prescription.

Co. J. 153.

Reg. 2.

A return upon an *habeas corpus* is to be taken less strictly than the pleading of a prescription.

4th obj.—A fourth objection was, from the variance between the custom that is set forth and the ordinance. The custom is, that the Mayor and Aldermen assensu *communitatis* remedium congruum, &c. apponere possint, et ordinare: but the act of Common Council is said to be de assensu *communiariorum*; and *commoners* may be such as have commons belonging to them, or the like; and are not the same as *commonalty*.

(*d*) Stated below from the City Records.

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Construction of the words "*communitas*," and "*communiarii*."

But this objection is answered by a view of the record itself, which hath not the word "*communitatis*," but "*communiariorum*," in both places. Indeed in the prerecited case of Wagoner, it is "*communitatis*" in both places: but there is a legal difference between "*communiarii*" and "*communitatis*" in Latin, as it is in English between "a commoner" and "commonalty." I and you, and every of us who are under the degree of nobility, are "commoners." In London their assemblies have some resemblance to the assemblies in parliament. They have a house, or body consisting of Lord Mayor and Aldermen, who consult apart by themselves; and another of commoners; and "the commoners" are those whom we call Common Council, selected out of the whole commonalty. Now the custom is, "that the Mayor and Aldermen by assent of those commoners (not the whole commonalty) may supply defects, make by-laws," &c. and it is at such Common Councils that ordinances are made. At common halls (*e*) *all* "the *commonalty*" are or may be present: but at Common Council only "these commoners;" and so they are called.

5th obj.—My brother Brown made another objection, that it appears not that Hutchins, the defendant there, was a freeman, or a foreigner, and therefore shall be taken strongest that he was a foreigner; and being a foreigner, he ought to have notice of the act of Common Council.

First, if notice (*f*) were necessary, it shall be presumed; for it is said, *vendebat ut factor contra formam et effectum actus*: if notice were necessary, he was no offender, unless he had it. Secondly, if he had no notice, he might have alleged it in the action below in his own excuse. Was it ever pleaded that they did give notice of the ordinance, or any action upon an act of Common Council? This were to alter the course of pleading. But, thirdly, no notice is to be given of the act of Common Council: it is *lex loci;* and every man, at his peril, must take notice of it. As if a Frenchman come into England, he must take notice of our laws; or, to come nearer, if a foreigner go into Wales, or county palatine, he must take notice of their laws and customs. London is a county palatine; and we take notice of their laws and customs. It hath been adjudged that a record removed from thence with a *venire facias hic* 12, &c. is good, not in an inferior court, or *ad*

The *lex loci* must be taken notice of by every man at his peril, when intermeddling with the concerns of the place. London is a county palatine, and the Judges take notice of their customs and laws.

(*e*) The *occasional* usage of select committees at very early periods for the transaction of the public business of the city seems to have introduced a permanent usurpation by the *livery* of the rights of "all the commonalty."

(*f*) See Comyn's Digest, tit. By-law, (C. 2.)

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curiam ten. coram Maiore, &c.; and the stile hath not *secundum consuetudinem, &c.;* it was no error; for we take notice of their laws and customs: and as statutes were heretofore proclaimed, so these ordinances are published and printed for the better divulging of them. But that is not of necessity; no man is bound to give them notice thereof; at their own peril they are bound to take notice.

I have done with the objections made at the Bench to the form of the return. I come now to consider the return itself in the matter and substance of it.

Upon this return there are three things to be considered; First, the customs set forth in it.

Secondly, The ordinance, or act of Common Council.

Thirdly, The record of the action brought upon this act of Common Council in the Court of Mayor and Aldermen.

For the first, the pleading is the same as in the case of the city of London, 8 Co. 121. "That London is an ancient city, &c.; and that there is a custom in it *quod si aliquæ consuet. in dict. civit. obtin. et approb. in aliqud parte difficiles sive defectivè existant, aut aliqua in eadem civitate de novo emergentia ubi remedium prius non existit, ordinata emendatione indigeant,* the Mayor and Aldermen, by the assent of the commonalty, may put and ordain a remedy *congruum, bonæ fidei et rationi consonum, pro communi utilitate civium et aliorum fidelium domini regis ad eandem confluent., dum tamen ordinatio hujusmodi domino regi nunc et progenitoribus suis et populo suo utilis et bonæ fidei et rationi sit consona;* and that this custom, and all other their customs by parliament, 7 R. 2., were confirmed;" and then sets forth, that at a Common Council held *secundum consuetud., &c.* 4 *Dec.* 13 *Car.* 2., the act or ordinance of Common Council, *now in question,* was made, *in hæc verba.*

Custom to supply defects in former customs, or putting new remedies where required, is good.

A custom confirmed by act of parliament, distinguished from a power by charter; or a custom in general, to make by-laws.

My brother Archer, and some others at the bar before him, have made several objections against this custom that it is void. I think it is good; and therefore of necessary use to be set forth to shew, that by their custom, which is confirmed by parliament, they have power to make ordinances, or acts of Common Council; and that ordinances, so made according to that custom, so confirmed by act of parliament, and according to the qualification prescribed, do bind; and that therefore these ordinances are not to be compared to a power by charter, or custom in general, to make by-laws. This was the opinion, not only of the counsel in Wagoner's case, but in infinite precedents before that case, and since, where, upon returns to writs of *habeas corpus,* in the front this custom of supplying defects in former customs, or putting new remedies, if the case requires, is set forth. And it is the foundation of most of the

ordinances now in force in London for the government of the city; which would be shaken if you take away this pillar, and leave to London no more power touching by-laws than you do to every ordinary corporation or company.

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The power of the City of London to make by-laws, is greater than that of ordinary corporations and companies.

By what law can they remove the herb market to Aldersgate-street, or settle the cloth market, old or new, at Blackwell Hall, (which it is agreed, 5 Co. 63. they may) and force foreign men to bring and sell their goods there and not elsewhere, unless you allow this custom? There was no particular custom to settle them in those places. And so I may instance in most of the rest of the ordinances which they have made; for *pro ratione personarum locorum et temporum* in matters of trade, they must vary from their former customs and usage in circumstances (those things being obsolete and improper now which were their former usages,) or otherwise all trade and good government in the city will be destroyed.

It hath been objected that there is no such custom; and this way of pleading is but of new invention; and it appears by the ordinance in Wagoner's case, that by 15 E. 3. the king granted just as the custom is set forth, "that if any customs before obtained were hard or defective, or any things *de novo emergentia* needed amendment, they might ordain remedy, &c. and so either there was no custom before, or it is destroyed by the grant; for if the King grant liberties to a corporation it destroys and determines the prescription.

Br. Prescrip. 102.

This objection (and so my brother ingeniously yielded it) holds not in our case; for a custom is expressly alleged in this return, and no such charter as that of 15 E. 3. appears in our case. But I will not help myself upon that answer, which serves only for his turn. I say, first, it follows not because the charter, 15 E. 3., grants such and such liberties, that therefore they held them not before. It hath been usual, and continues still unto this day, for the corporation to take new grants upon the entrance of every king after his predecessor's death; and the law allows them, though the words be *damus et concedimus*, to plead them as confirmations if they will. Our old law books take notice of such a custom to make ordinances.

It hath been usual for the corporation of the city of London to take new grants upon the entrance of every King after his predecessor's death; and the law allows them to be pleaded as *confirmations*, though the words be *damus et concedimus*.

But, secondly, Though a charter may determine a liberty, or franchise held by prescription, which may also lie in grant, as warren, waif, stray, *tenere placita*, and the like; yet it cannot determine such a franchise as doth not at all lie as grant. By the custom of London they may devise their houses, and devise in mortmain. If the King by his charter grants they

49 Ass. pl. 8. 49 E. 3. 3. Although a charter may determine a liberty or franchise, which may also lie in grant, yet it cannot determine such a franchise as doth not lie in grant.

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shall devise, this charter avoids not the prescription; because the thing lies not in point of charter. No more doth it lie in charter to amend their old customs, or to supply their old customs.

But, thirdly, Whether the franchise of making ordinances to amend or supply defects in former customs lie in charter or not, yet it is expressly confirmed by parliament, 7 R. 2., as I shall shew; and the parliament may grant that which lies not either in charter or in prescription. Oh! but it is objected that the confirmation of a void custom is void; that this is an usurpation, and not a custom; that this is to make London like the Hans Towns, independent upon the parliament, and the Courts at Westminster; and gives them a legislative power *condendi, interpretandi, et emendandi leges.* And that the act of parliament, 7 R. 2., confirms only their liberties in general: that they shall enjoy them *licet usi vel abusi non obstante statuto, &c.* but confirms not the customs or franchises in particular. And divers books were cited to prove the difference between a general and particular confirmation.

7 R. 2. Rot. Parl. No. 37.

I have summed up these together which were by my brother enlarged.

I answer, first, that there is no such danger of entrenching on the parliament, or Courts at Westminster, or other power, or hurt to the subject, when you consider what this power is. It is to make ordinances for the amending of such of their customs as are difficult or defective; and, in case of new emergencies, for applying new remedies. But in these ordinances there must be these conditions:—there must be, first, *remedium congruum;* secondly, *bonæ fidei consonum;* that is, as I take it, a remedy really and *bona fide*, not in shew only, and for private ends, or lucre, upon public pretences; thirdly, *rationi consonum;* fourthly, it must be *pro communi utilitate civium;* fifthly, *pro communi utilitate aliorum fidelium ad eandem civitatem confluentium.* And it hath again a further limitation, *dummodo regi et populo suo utilis sit.* I understand not what hurt or danger it is for them to have power to make ordinances so qualified; and if they be not so qualified, neither custom, charter, nor act of parliament, extends to make them good.

The Courts of Westminster will judge if the by-laws made in the city are beneficial to the public, and therefore good.

Secondly, Where these ordinances are made, they are not the judges of them, as was objected, upon a *habeas corpus.* The Courts of Westminster, where the ordinances shall be set forth, will judge whether they be made according to those qualifications; and if they be not so, will judge them void. They have power to examine what their former customs were, if the ordinances be bottomed on former customs; and in case of new emergency, which had no former custom to ground upon

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it, they may examine whether they be good for the king and people, and so either affirm or disaffirm them.

If the City of London grossly abuse this power, a *quo warranto*, or information of that nature, may be brought against them.

Nay, if the city grossly abuse their power, a *quo warranto*, or information of that nature, may be brought against them, and their liberties seised into the King's hands. But I confess, for my own opinion, I hold all these several qualifications of their ordinances are but exegetical of the first, that is, that it be *remedium congruum;* for it is not *remedium congruum*, unless it have all the other qualifications. The city are a considerable part of the body of the nation; and what tends to the destruction of any member, tends to the destruction of the whole. If it be good for the city, it is good for the King and people; and if it be not good for the King or people, it is not good for the city. And if it be not *rationi* or *bonæ fidei consonum*, it is not *remedium*, much less *congruum remedium;* and it is not a remedy, if it be against law. So that, in the consideration of this act of Common Council, it will not be necessary to make a several application of these qualifications to every branch of this act; but to consider it whether it be *remedium congruum*, and according to law.

Com. 399. b. and the cases there cited.

Whereas it is objected that 7 R. 2. only in general confirms the liberties of the city, I must agree the difference between a particular and a general confirmation; and that my brother hath rightly recited the number roll of the parliament roll, 7 R. 2. But the course then was, as you may see in the Princes' case, to have charters in parliament under the King's seal in such cases: and so it was in this; the parliament roll was not the act of parliament; there it is an express charter in parliament, 7 R. 2., *de assensu prælatorum, &c. per ipsum regem et concilium in parliamento.* In that charter there is an express recital of the charter, 15 E. 3.; and of this power of making supplies to defective ordinances, and in new emergencies, amongst other liberties; and thus a confirmation of them all by the King *de assensu prælat., &c.* and this is an express particular confirmation of this franchise. So that now it appears that this franchise of making by-laws or orders to supply defective or difficult customs, or to apply new remedies in new emergencies, is expressly and particularly confirmed in parliament; and whether it were grounded upon former usage, or the charter of 15 E. 3., will not be material, it being particularly allowed, and made good by parliament; and the ordinances are good by virtue of that act of parliament, if they be made according to the qualifications.

The early practice as to charters in parliament.

The franchise in the city of making by-laws or orders to apply new sound remedies in new emergencies is expressly confirmed in parliament.

I have been the larger in this, because this objection struck at the root, and trenched far upon, the government of the city in the general; though in this particular case, as I shall shew

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by and by, I think the ordinance were good, if this custom had not been set forth.

But now to apply all this more particularly to our case, and to shew how far we agree, or differ, in this case of making ordinances:—Notwithstanding all that hath been said, I do not conceive that this act of Common Council, whereby it is enacted that no person shall be admitted a factor or broker in Blackwell Hall, or Leadenhall, unless he be first approved and admitted by the court of Mayor and Aldermen, doth bring every by-law and ordinance made by them within the compass of the customs confirmed by the parliament, 7 R. 2. For though it must be taken for granted, what is alleged, that there is a custom, by a Common Council, to amend old customs difficult or defective; and also to ordain a remedy upon new emergencies; and that this custom is confirmed by parliament, 7 R. 2.; yet all this cannot be taken to make that a custom which was none. It proves that they had power by custom and charter, and that confirmed by parliament, to make by-laws or ordinances; and so such ordinances will have the effect of by-laws made by virtue of a custom and act of parliament, but not the effect and force of a custom as a custom. To express myself a little more plain:—some things are good by their customs, which are not good in the like kind by their by-laws; as a custom to imprison, or a custom whereby goods shall be immediately forfeited, as foreign bought and foreign sold, which are not good by a by-law, constitution, or ordinance, enabled only by this general custom or act of parliament *apponere remedium congruum* where there are new emergencies, or that the custom be difficult or defective: and therefore it is true, which hath been said in that case of Wagoner, in the ordinance the custom itself, *that no person not free should sell by retail, or keep any open or inward shop for sale of any wares, or use of any handicraft trade*, is set forth, though by way of recital; and the judgment of the Court of Common Pleas in the report of that case was grounded partly on the custom, not the ordinance barely. But the penalty in that case was allowed to be good by virtue of the ordinance without a particular custom, as it was also in the case of the Chamberlain of the city of London; and so I take the law clear in this case.

8 Co. 122.

8 Co. 125. a. 127. b. 5 Co. 64. Clark's case.

It is lawful to impose a greater penalty of 5*l.* for the offence; and that it shall be recovered by the Chamberlain, although there were no such custom before. But to make a constitution or by-law to have the force of a custom by virtue of the general words of the act of parliament 7 R. 2., founded upon the former custom to make and ordain a remedy upon

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new emergencies or defects, were (as was objected) in effect to give a legislative power.

But yet this clause, by virtue of the charter or custom confirmed by parliament, to give remedy in difficult or defective customs, and in new emergencies, is of singular use. If there be a custom, as in truth there is, to prohibit foreign bought and foreign sold, it gives them power to make by-laws to prohibit any thing which may tend to elude or evade that custom; for it is *rationi consonum* that, since custom which is *lex loci* hath settled such a right, that all necessary expedients for the preservation of that right should be void; and therefore in the Chamberlain of London's case, custom having made it a law that goods foreign bought and foreign sold should be forfeited, and divers statutes made against deceitful making of cloths, it follows that to prevent the breach of that custom, and of those statutes, they may appoint several markets and places where, and no where else, foreigners may sell, and that hallage may be paid for it. Whereas without such a custom, or other like precedent grounds, such a constitution or by-law was naught. So, secondly, suppose a custom, that factors or brokers shall be elected out of the freemen of their several companies, and presented by the wardens or others of their several companies to the Mayor and Aldermen, and by them to be admitted, allowed, and approved to be brokers; and such a custom is affirmed to be in London, by stat. 1 Jac. c. 21., I conceive they may by virtue of this custom, confirmed by parliament, ordain, that without any such election, or presentation, they shall be approved of by the Mayor and Aldermen; or that where there is occasion of brokers or factors for any manner of business, not within the compass of any particular mystery or company, they may ordain, that in such cases the Mayor and Aldermen shall approve all such factors and brokers; for this is as well within the cases where the customs are defective, as of new emergencies. For there is no alteration of the bottom or foundation of the custom, which is, that none but such as are approved shall be brokers or factors. The manner how, and in what manner, and by what persons to be approved, not being in itself unreasonable, may very well be altered by their by-law, or act of Common Council; for custom having created and settled a right in them to have such franchises, there is now a co-operation of the custom and of the power, to make by-laws or ordinances in difficult or defective cases, or new emergencies. So that such constitutions or ordinances as are made for the better preserving their rights and customs are good. So that I hold, if there were no more in the case, yet, they having a right to the forfeiture of foreign bought and

By-laws may be made to support a good custom, although they would be void if the custom did not exist, 5 Co. 63.

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sold, that is ground enough to restrain public factors in the market but such as they should approve, if without it (as I shall shew anon) it is impossible to avow foreign buying and foreign selling according to the custom. And, secondly, that the city having the markets, and power to regulate and govern the markets within themselves, as pursuant to that right they may appoint such public officers, or brokers, or other officers, as they shall think fit to trust, and to exclude others from being public officers, or factors in their markets; not excluding (as I conceive this ordinance doth not) every man from selling his cloths, or those which he *bonâ fide* holds in coparcenary and upon a joint trade, by himself or his own servants. So that if in truth it appears to the Court that this ordinance or act of Common Council is grounded upon and made in aid of the former liberties or franchises of the city, I think this ordinance to restrain factors is good enough.

5 Co. 62. The case of the Chamberlain of London, as it is reported, is much stronger than our plaintiff's case as to this point; for there it is resolved that an act of Common Council that none shall put broad cloths to sale within London before it is brought to Blackwell Hall to be viewed and searched that it may appear to be vendible, and that hallage shall be paid, *1d.* per cloth, upon forfeiture of *6s. 8d.* the cloth, and to be recovered by debt by the Chamberlain, was good; and this without reciting or mentioning any precedent custom, but only the custom confirmed by parliament to make ordinances.

I come next to consider the ordinance itself, so far as it is before us; and I hold it is good *in toto*, and *in quâlibet parte*. Wherein I hold, first, that the matters contained in this ordinance are warranted by preceding customs of the city; and that this ordinance shall not be taken to be only a by-law, or constitution, founded upon the general custom to make by-laws or constitutions, without reference to particular customs to warrant it. And, secondly, if there were no such full custom to support the ordinance, yet it is good as a by-law or constitution, founded partly upon former customs or franchises of the city, partly upon this power to put remedy in case of defective customs, or new emergencies, as I said before.

Upon a writ of *habeas corpus* of privilege, and only to shew cause why the party should not enjoy his privilege in the Common Pleas, that being satisfied, the Court may at their discretion remand the prisoner, and not meddle with the other causes returned upon him. When the cause is returned upon a *habeas corpus* of privilege, it shall not be taken strictly as other pleadings are, but the return may be supplied and supported by evidence of fact, record, custom, or the like.

As preparatory to this, I must lay this ground,—That this being a writ of *habeas corpus* of privilege, and only to shew cause why the party should not enjoy his privilege in this court, that being satisfied, the court may, at their discretion,

remand the prisoner, and not meddle with the other causes returned upon him. 2dly, That when the cause is returned upon a *habeas corpus* of privilege, it shall not be taken strictly as other pleadings are, whereby the court is tied up wholly to the matter appearing upon the record: but the return may be supplied and supported by evidence of fact, record, custom, or the like. So that in truth, if that *(in rei veritate)* it shall appear to the court, either implicitly upon the return, or otherwise *per matter dehors*, that there is cause to proceed below, the court may grant a *procedendo*. And that, therefore, if either upon the by-law or ordinance itself, or by examination or otherwise, it shall appear to the court, that there is a liberty or custom against foreign bought, or foreign sold, that all cloths to be bought or sold within London shall be brought to Blackwell Hall and Leadenhall markets; that all brokers and factors ought to be approved by the Mayor and Aldermen, or in some other manner in the city; and that so this ordinance is but in affirmance of their ancient liberties; then a *procedendo* ought to be granted, as well as if such custom had been particularly retained; or, secondly, if the custom should appear in part only, as the custom against foreign bought and foreign sold, and, for that end, that public factors ought to be approved, that this is a sufficient ground for this constitution or by-law, that none shall be a factor till approved by the Court of Mayor and Aldermen.

First, then, I say, that this writ here, or other like writs of *habeas corpus*, returnable into the common bench, are writs of privilege only. They suppose that the person who brought the *habeas corpus* hath cause of privilege in the common pleas; either that he actually hath commenced a suit there, or was coming to sue there; and *veniendo*, *morando*, or *redeundo*, is arrested before: or, 2dly, that he is sued in the common bench as defendant, and so ought to have his privilege likewise, *veniendo*, *morando*, *et redeundo*. The ancient forms of *habeas corpus*, and *corpus cum causâ*, as the particular writ of privilege for officers and clerks still do, did set forth the particular causes of privilege, and begin with *ostensum est nobis*; and though our writs are now shorter, yet they have the same supposition in law, all common pleas out of particular liberties being supposed to be sued in this court; and, indeed, in strictness, neither London, nor any other inferior court, can hold plea of any matter not arising within their franchise.—Then it is sufficient to satisfy the privilege of this court. If he were sued below, after the time of privilege here, for a matter wherein he might have his action here, as for debt, &c., they would discharge the action below; so if he were arrested for

Vid. O. E. 478, 479.

O. E. 478.

O. E. 480.

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surety of the peace below, upon putting in surety in the chancery, they would discharge him in this court: but if the arrest there were before the time of privilege here, which in many cases they would examine, then the privileged person putting in bail to the action here was remanded, and some term day was given to the prosecutors below to shew cause why he should not have his privilege. If the cause returned were such, for which no remedy could be here, they did frequently grant a *procedendo*, the privilege being satisfied; which writ is in some cases discretional, and, therefore, it is *certis de causis justic. moventibus;* not mentioning the particular cause. And so was the writ of *habeas corpus* in Wagoner's case, a copy whereof I have, bearing *teste 7 Nov. 7 Jac., ostensum est nobis ex parte Jacobi Wagoner, &c. ut fuit in veniendo versus curiam nostram præd. isto eodem termino ad loquend. cum consilio et attorn. ejus, pro eorum advisam. habend. in quodam placito debiti super demand. 10l. per ipsum versus quendam Joh. Cox. in eâdem curiâ nostrâ, unde breve nostrum de cap. præd. Joh. à curiâ nostrâ præd. emanavit Vic. nostris Lond. direct., et coram Justic. nostris apud Westm. return. existet per ministros nostros arrest., &c.*

Antient practice upon cases of privilege from arrests in the Common Pleas.

29 E. 3. 33. Aud. quer. 37. (g).

Robert Nevill was arrested in London, and imprisoned at Newgate, at the suit of J. S.; then William de la Pole sues out an execution against him upon a statute merchant. Nevill thereupon brings an *audita querela*, and a *venire facias* issues upon it, returnable in the common bench, and he came not; whereupon, upon suggestion that he was in prison, he was brought hither by *habeas corpus* by the serjeant, and remanded, and the serjeant commanded to have him here again the next day; and was not remanded to the Fleet, notwithstanding the action here, and with all that he was outlawed, and the outlawry appeared of record.

9 E. 4. 35. 38 H. 6. 12. 5 E. 4. 44. Br. priv. 36. Br. priv. 39. 10 H. 6. 10. Br. priv. 53.

The like precedents of remanding prisoners may appear 20 H. 6. 3., (*h*), per Choke, *deins case de custom de Londres* alledge *ou le plaintif ne poit aver remedy al common ley, et le party arrest est en tiel plight qu'il poit faire attorney en l'action in Banck, il serra remand à Londres, mes est, videtur, ou il fuit primier arrest la est al discretion del court ve. s'ils voile remand lui ou le plaint en Londres est eigne al brief, si ne soit in condemnation; la 5 E. 4. 44., et fuit remand.;* 8 E. 4. 17., *nul remand.*

Examination was therefore frequently used upon writs of *corpus cum causâ*, or *habeas corpus;* and whereas the party is concluded by a return, that he cannot traverse it, yet the courts

(g) Fitzh. Ab.

(h) 9 E. 4. 35. and Br. Priv. 22.

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are not bound up by a notorious falsity returned, but may examine it.

Secondly, I say a return upon an *habeas corpus* of privilege need not to be certain, as other pleadings are, and the matter returned may be supplied by other matter in fact; for no issue may be taken, or demurrer joined upon the return, nor upon the awards of the courts in it; nor does any writ of error lie; the end of the return is only to ascertain the truth of the matter. In Wagoner's case (called the case of the City of London) the custom, whereupon the act of Common Council in that case was grounded, "that no person, not being free, should sell by retail, or keep any open or inward shop for putting to sale any wares, or use any trade or handicraft," is not set forth positively in the return, but only in the act of Common Council it is recited, "Whereas by the antient charters, customs, franchises, and liberties of the city confirmed by sundry acts, no person not being free should sell by retail, or keep any open or inward shop for sale of wares, or use of any trade or handicraft;" and yet for that cause, exception being taken against the return, it was over-ruled.

8 Co. 127. A return upon an *habeas corpus* of privilege need not to be certain, as other pleadings are; and the matter returned may be supplied by other matter in fact.

No unfreeman to sell wares by retail.

But it is objected, that in that case the custom itself, "that foreigners shall not keep open or inward shop for sale of wares, or use of any trade or handicraft," appears in that act of Common Council prohibiting foreigners to keep open or inward shop, or to use any trade or handicraft:—but in this act of Common Council now returned the custom appears not, but only reconstitution or by-law. And I agree there is some difference: but that will make no alteration in the case; for that it appears in Wagoner's case the action was brought by the Chamberlain of London for ———, and sets forth shortly the act of Common Council, that no foreigner should keep any open or inward shop, or use any trade or handicraft within the city, upon pain of forfeiture of ———; and that the defendant used the trade of a tallow-chandler contrary to the intent of the said act of Common Council:—where, first, I observe that the action is not grounded upon any custom, nor mentions any custom, nor recites that part of the act of Common Council wherein the custom is mentioned; but only sets it forth as a by-law, or constitution:—that by act of Common Council it was ordained that no person not being a freeman should keep any open or inward shop, &c. and yet a *procedendo* awarded, or agreed to be awarded upon it.

I did not find the record of a *procedendo* in Wagoner's case; —but I find divers precedents of *procedendos* after, upon the very same returns, the Court being satisfied that the law was such as it is delivered to be in that case of Wagoner's:—Se-

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condly, That in truth the custom, which is alleged in that ordinance, doth not reach to that case; for the custom recited is, "That no man, not being a freeman, keep any open or inward shop, or other inward place or room, for use of any handicraft;" and the constitution is, "That no man use any handicraft within the city of London;" which is a differing thing from the custom alleged. It is one thing not to use a handicraft, another not to keep a shop or room for using it. In Andrew de Vine's case, 34 H. 6., which I shall have occasion to mention again to prove the custom, an *habeas corpus* issued out of Chancery, directed to the Mayor and Sheriffs of London, to bring his body before the King in Chancery, it being vacation time. They make a return; "That it was provided and ordained *(ab antiquo)* by the Mayor, Aldermen and Commonalty of the said city, according to their laws, ordinances, liberties, and free customs, confirmed by parliament, that none should exercise the trade of a common broker, or maker of bargains, *non de contractu seu bargando quocunque inter mercatorem et mercator : faciend. tunquam communis abrocator seu mediator se intromitteret*, until he were admitted by the Mayor and Aldermen, &c. and that Andrew de Vine, for his breaking and making of bargains, not being so admitted, he being convicted by his own confession before the Lord Mayor and Aldermen, he was imprisoned." To this he makes answer; and they reply, and pray that he may be remanded. The Lord Chancellor, by the advice of the two Chief Justices Fortescue and Prisot, Asheton, Justice, and the rest of the Justices, and having heard the reasons, evidences, and allegations on both sides, and the charters, liberties, statutes, records and ordinances of the city on that behalf, *ex antiquo fact. et approbat.*, did adjudge that he should be remanded in affirmance of the said liberties, statutes, and ordinances.

Broker admitted by Mayor and Aldermen, 34 H. 6.

This precedent I shall anon make use of to prove the custom: but I urge it now only to this purpose, to shew that the Court did make use of matter *dehors* to satisfy themselves of the cause of the return; and they did not there allege a custom time out of mind that the brokers ought to be approved; but only that it was *ab antiquo* so ordained according to the liberties of the city confirmed by parliament. But the truth of the case appearing, their charters and records being produced, and the politic government of the city being concerned in it, he was remanded.

That case was a much stronger case than this here; for he had no remedy there after a *procedendo*, being convicted and remanded, and no action to be brought to which he might plead. But in this case the plaintiff, Hutchins, being detained

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only upon a mesne process, the merit of the case is saved unto him, though he should be remanded; for he may plead or demur to the action below. If there be no custom, but a by-law, he may demur upon it if his matter will bear it; or he may take issue upon the custom, if it be pleaded: and if judgment be given against him, he may bring his writ of error; so that he hath his full remedy if his case deserve it, though he be remanded.

Whereas if a *procedendo* should not be granted, the plaintiff, who by act of Common Council ought only to sue there, is wholly without remedy, which I desire may be observed. I take a great deal of difference between writs of *habeas corpus* of privilege in the King's Bench or Common Pleas, which are *ad faciend. et recipiend.*; and so are *habeas corpus* cases in Chancery, and writs of *habeas corpus ad subjiciend.* out of the crown office in the King's Bench. These last writs are proper for the determination of the causes, and then the return must be certain and direct: in those others (as I have said before) the reasons are not the same. The Court may remand at their discretion, and inform themselves of the charters, evidences, and other matters *ab extra*; and so proceed, as the civilians say, *summariè, et de plano, rei veritate tantum inspecta*; and so grant a *procedendo* or not, according as they think fit; and this without prejudice to the party, who hath still his just defence in the Court below.

Writs of *habeas corpus* of privilege, distinguished from writs of *habeas corpus ad subjiciend.* out of the Crown Office in the King's Bench.

Summary proceeding.

For application of all this; first, I say in the general, that it appears by the act of Common Council or ordinance here returned, that it is but an epitome of their former acts of Common Council in force, and that the intent of it is to have the substance of those acts concerning woollen cloths, &c. contracted and reduced into one act of Common Council; and "that no man may pretend ignorance, or difficulty of being informed of the customs and laws of the city, needful to be known in this behalf," so are the words of the act itself; so that by this it appears, that this whole ordinance is grounded upon, and is but an abstract of their former laws and customs, and gives ground to inquire into their former customs. And more particularly there is special mention made of the custom against foreign bought and foreign sold; as fol. 2. "For the preventing of foreign buying and foreign selling against the ancient customs and privileges of this city;" and fol. 8. "that many freemen in pretence are immediate buyers, yet are in reality but agents and brokers for strangers and foreign men;" and it declares such practices to be contrary to the customs and privileges of the city; and that such buying is colouring of foreigners' goods, and contrary to the oath of a freeman. And it declares "that

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all such practices are contrary to the custom of the city, and that all such commodities so bought and sold are forfeit to the city."—So that here is as full, if not a more full, recital of the custom concerning foreign bought and foreign sold, than is in Wagoner's case concerning foreigners not keeping shop, or exercising a handicraft in London; and gives as much occasion to inquire after it.

Then, as touching that part of the act which concerns factors, which is the only matter arising upon this return. Though it set it not forth as a particular custom, that no factor or broker shall be admitted or allowed, unless he be first approved by the Court of Lord Mayor and Aldermen; &c. yet, as I conceive, if it can be proved in truth that this is the custom of the city, it is comprehended in the general recital: but if there seem no particular custom for it, admitting the custom of foreign bought and foreign sold, this very ordinance, or by-law (as I conceive) is sufficient in law to restrain all public factors which be not so approved. The preamble which ushers it in is to this purpose observable :—"And for the preventing of sundry abuses committed by factors and others, in that great abuse of foreign buying and foreign selling, to the hurt of the liberty of the city, be it enacted that no person shall be allowed as a factor in any of the halls aforesaid, unless he shall be first approved by the Court of Mayor and Aldermen." It implies that the abuses of factors in foreign buying and foreign selling cannot be avoided but by having public factors approved. Whereupon, (though I shall not need this help, for I shall shew by and by that it was the ancient custom of the city that all public brokers and factors ought to be first approved), I do infer that, admitting the custom touching foreign bought and foreign sold to be good, that for the support of that custom they may prohibit brokers and factors in their common markets, unless so admitted; for otherwise their custom against foreign bought and foreign sold would fail, as is apparent, not only by ordinances, but to common reason. If every man may be a factor, and buy cloths in the markets, and sell out of the markets, either for himself or others, as he pleaseth, in their two halls, it will be impossible to keep the custom, that foreigners shall not buy in the markets, nor sell out of the markets; and, therefore, this by-law, admitting that custom to be good, which cannot be denied, is necessary to support it, and within the clause of putting a remedy to difficult or defective customs and new emergencies.

5 Co. 63.

Their custom being confirmed by act of parliament, it is said that "all such ordinances, constitutions, or by-laws, are allowed by law, which are for the true and due administration

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of the laws or statutes of the realm, or for the good government and order of the city,—the body corporate." So what hath been said will in some sort answer what hath been insisted upon on the other side, upon the difference between by-laws and customs, and then urging that this is a by-law and not a custom: for if there were no former customs for public factors to be approved, yet the necessity of supporting the other custom would be a ground to make such an ordinance or by-law, as is *fidei et rationi consona et domino regi et populo utilis*, as I shall shew. But because the whole policy and government of trade in this city is concerned in this case, I shall more at large consider all the grounds and reasons of the act of Common Council, and all the objections made against it, so far as relates to our matter in hand.

The intent and scope of the act hath been set forth already to be, to regulate the draperies in Blackwell Hall, and Leaden Hall; to discover frauds and deceits in making and uttering of them; to prevent foreign buying and selling against the ancient customs and privileges of the city; and to contract and reduce all the acts of Common Council then in force, and necessary for those purposes, into one.

How this ordinance is in all things applicable to these purposes will easily appear, by considering the several parts of it. But this which we have now in hand, concerning facts relating more particularly to the preventing of offences by *factors* (*i*) and others, in the great abuse of foreign buying and foreign selling (so are the words of the act of the Common Council) it will be but necessary in respect of the objections made by my brethren against this custom, and not impertinent in respect of the ordinance, to say something of the grounds and reasons of that custom, and what it is; upon which it will appear how reasonable that custom is in itself. And then how necessary it is for preservation of that custom that factors be regulated.

The custom against foreign buying and foreign selling is reasonable.

It must be granted—1st, That this being an island, and having the advantage of the sea, and many excellent harbours and ports, the riches, strength, and safety of it consist in trade at home and abroad, for import and export of commodities, and the consequences of its shipping, training up mariners and seamen, and the like.—2ndly, To preserve trade, there is a necessity of order and government for regulation of it, to prevent deceits and confusion. To apply this to our case. Cloths are one of our chief staple home commodities: if every man may make what cloths he will, and make sale of cloth failing in substance,

8 Co. 125.

(*i*) A blank in the manuscript.

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or in the length, or mixed with false materials, it will bring slander upon us, a refuse upon our commodities, and an impoverishment of the nation. So for foreign commodities, if without a regulation every man may buy and sell and barter, when and as they please, the emulation by one out-buying another, the want of order, and consent, and good agreement, amongst merchants (as for the purpose, not to buy such kinds, or above such prices, or taking off such and so many home commodities,) must needs hinder trade, drain and exhaust our coin, hinder the price of our exported commodities, enhance the price of those which are imported; and consequently, when more is exported than imported, bring a consumption upon the trade and wealth of the nation. This I found by experience. This last December, upon the setting the prices of wines, the Canary wines, about the 18th of January, were rated at about 16*l.* or 18*l.* the pipe. For want of regulations of that trade, they are now risen to 34*l.* or 35*l.* the pipe; for, although no nation buys the Canary wines but the English; yet, because there is no regulation of that trade, every man turns an adventurer, buys the commodities at what price they demand, and even for ready money, and so spend near 100,000*l.*, and which would be money at home only for want of regulation. For if our merchants, who have the whole Canary trade, would agree together, they might take off the Canary wines for reasonable prices, and for other commodities, not ready money.—3dly, That, therefore, the chief trade of the nation is driven on by corporations and companies in cities and boroughs, who, having many restraints upon them; some as to their persons, *viz.* that none should buy or sell but such as have been apprentice and skilful; others as to the business and concerns of their trade, are regulated and tied by certain rules and orders touching their trade, by custom in the most places, and by patents or by-laws where custom fails. And the general liberty which the law permits to every man for buying and selling (other than for a man's own private use) may, by the common law of the land, without help of an act of Parliament, be in some sort restrained. The King may erect *guildam mercatoriam*, a society or incorporation for the increasing or regulating of trade. He may appoint such and such foreign commodities to be brought to such and such places, and no

8 Co. 125. The King may erect a society or incorporation for the increasing or regulating of trade.

The King may appoint such and such foreign commodities to be brought to such places, and no other (*k*).

(*k*) "To the intent he may be better answered his customs and other duties." 5 Co. 64. See 1 Blackst. Com. 314.

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other, 2 E. 3. 7.; John de Britaine's case; and allowed for good law in the Chamberlain of London's case.—4thly, That by reason of the taxes, scots and lots, and duties to which these incorporations are liable and subject for maintenance of their trade, and the public charge of their incorporations and societies, and for the better regulation of trade, it hath been used by custom in most, if not in all the ancient cities, incorporations, and boroughs, to prohibit, upon pain of forfeiture or other penalties, foreign bought and foreign sold, within their liberties; which custom is allowed in our books, 10 Eliz. 279. 8 Co. 125. and 128. a. 9 H. 4. Rot. Parl. No. 30.—5thly, That with much more reason this custom of forfeiture of foreign bought and foreign sold is allowable in London, because of the great charges they are at (and to which strangers are not liable) as well to the maintenance, defence, honour and ornament of the city in general, and in maintaining the offices, charges, and duties belonging to the City, as for providing proper markets for all vendible commodities, as in our case Blackwell Hall and Leadenhall for cloths, and the charges in keeping these places, and officers for keeping, searching, and viewing of the commodities, and other regulations of trade.

2 E. 3. 7.
5 Co. 63.

The reason of the custom of foreign bought and foreign sold.

What this custom of London as to foreign bought and foreign sold is appears fully in that Parliament Roll, 9 H. 4. "That no merchant, stranger to the liberty of the City, (that is) no foreigner (none who is no freeman) shall sell any merchandize or wares, within the liberty of the said City, to another merchant, stranger, or foreigner; nor that such merchant, stranger, or foreigner, buy of any other merchant, stranger, or foreigner, within the liberty of the said City, any such merchandize or wares, upon pain of forfeiture of them. Saving to all denizens the power at their will to buy within the liberty of the city, of any merchant stranger's merchandizes in gross, to their own proper use, so that they do not sell them again to any other." Upon this, I observe, that strangers may sell in gross within London; but not to foreigners, but to citizens; and, therefore, the public markets are for strangers to sell in, and not for citizens. So strangers may buy in gross as well as by retail within the liberties of the City: but that is of citizens within their shops, and not of foreigners in the market. So that, to apply it to the case of Blackwell Hall,—strangers may sell in Blackwell Hall, but not out of it. They cannot buy any cloths there: citizens may sell cloth out of it, and not in it. But for a man's own use, and not to sell again, any man may buy merchandize in gross.

What this custom of foreign bought and foreign sold is.

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So in the charter, 23 Jan. 20 H. 7. this franchise is recited and confirmed to the City; as also by the charter of King Charles the First, 14 Car. 1. In both it is recited that time out of mind "*usitatum fuit, et authoritate parliamenti approbat. et confirmat. quod nullus extraneus à libertate prædictæ civitatis vendat vel emat ab altero extraneo à libertate dictæ civitatis aliquas merchandisas seu mercimonia infra libertates ejusdem civitatis sub forisfacturâ* of the merchandise or wares so bought or sold; and that the Mayor, Commonalty, and Citizens, should have the forfeiture, *salvo semper quod magnates domini, et proceres, ac alii Angliâ et indignæ cujuscunque conditionis fuerint pro familiâ et usibus suis propriis infra libertates civitatis præd. libere potuerunt emere quascunque merchandisas in gross absque aliquâ forisfacturâ, seu perditione, aut impedimento quocunque, ita quod alicui alteri merchandisas præd. non revendit.*"

That the custom of foreign buying and foreign selling extends only to the retailing trade is totally a mistake.

This, by the way, shews that what was said, that the custom of foreign bought and foreign sold extends only to the retailing trade, is totally mistaken.

This being the ancient custom, is, therefore, confirmed in general by *Magna Charta*, cap. 9. *Civitas Lond. habeat omnes libertates suas antiquas, et consuetudines suas*; and more particularly by the parliament, 7 R. 2. which is set forth in this return; and these customs are not taken away by general words of other acts of parliament, as it is agreed, 8 Co. 127.; and, therefore, by act of parliament, 7 H. 4. c. 9., it was provided "that as well clothiers as other merchants might sell cloths, as other merchandizes in gross within London,—as well to foreigners as citizens," as conceiving the general acts formerly made for giving liberty of buying and selling freely, notwithstanding any custom or otherwise to the contrary, extended not to it. But this tended so much to the destruction of the City, that in the very next parliament it was revoked upon the petition, not of the City, but of the Commons of England; and the custom restored; so that now here is a particular confirmation, by act of parliament, of this particular custom of foreign bought and foreign sold. The words of 9 H. 4. are, "*Le Roy voet que les Citizens de Londres aient leurs libertyes et franchises touchant cest article, cy entierment come ils les avoyent devant le darrein parl. tenus a Westm., le stat. fait a mesm. le parl. nient contresteant.*"

9 H. 4. Parl. Rot. No. 30. cited 8 Co. 127.

My brother Archer objected that this took away only 7 H. 4.; but left other general statutes, whereby the trade was left open as it was before. But I answer, first, the statute of 7 R. 2. was after the statutes 9 Ed. 3. c. 5., 25 Ed. 3. c. 2., which he mentions; and so was 50 and 51 Ed. 3. which I cited before.

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That the statutes did not take away the custom of London is not only resolved in 8 C. 128. upon the construction of 7 H. 4. but also by all the judges in that case of Andrew de Vine. He alleged that all merchants, strangers, and others, of the King's amity might lawfully sell all their merchandizes in London, and every other place in England, to every person except the King's enemies, as well by foreigners as denizens, any statute, franchise, ordinance, &c. notwithstanding. By virtue of divers statutes of and in the times of H. 6., H. 4., R. 2., and El. 3. the Mayor and Sheriffs of London expressly denied that there were any such acts of parliament in form; whereby any power is given to any person, denizen, or alien, to be broker or mediator, to make bargains or contracts between merchant and merchant; nor to occupy that office of broker or corrector in other manner or form than was expressed in their return. And it was adjudged for them as I have before said.

Now then this *custom* (*l*) of foreign bought and foreign sold to be forfeited being so great and necessary a franchise of the city, if any person may be a public factor at his pleasure at Blackwell Hall market, it is impossible, as I have said, to prevent it but that this person may sell the goods of a foreigner to another foreigner, or may buy goods of a foreigner for a foreigner; or indeed he may buy goods, as of late they have usually done for himself, whether a foreigner or a freeman, or colour them as for himself against the custom; and this is unavoidable. And therefore such a by-law or ordinance which is necessary to support this *custom must* (*l*) be also good. Secondly, Blackwell Hall and Leaden Hall being the public markets for cloths, and the city being responsible for them if lost, it is fit in their own market they should have their own public officers, and not any imposed upon them. Every man may sell his own cloth by himself or his own servant; or buy in the market, not buying or selling contrary to custom. But it is reasonable, as to public officers in their own market, there should be none but such as they approve; and this may be well enough settled by them by a by-law. And truly in this particular the by-laws or customs of London are not to be compared with the by-laws of other corporations, or of particular corporations in London, there being a custom, and a charter, and that particularly confirmed by parliament, enabling them to supply the defects or difficulties in their customs. The case of the Chamberlain of London in the fifth re-

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(*l*) The words "custom" and "must" seem to be omitted by mistake in the manuscript.

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port hath (as I said before) nothing so strong a foundation as our plaintiff's case hath.

It is not grounded upon any particular custom, but only the general custom of making ordinances. And indeed many acts of Common Council now in force have no other foundation.

Many acts of the Common Council of the city of London have no other foundation than the general custom of making ordinances.

But this act of the Common Council is grounded upon the custom against foreign bought and foreign sold; so that take this to be only a by-law or constitution, yet the bottom or foundation of it being a custom, and this by-law or constitution requisite for the preservation of it, it is good enough as I conceive.

It is an ancient custom in the city of London to restrain common brokers or factors from exercising that trade or faculty without approbation; and also to take sureties of them by recognizance.

But to make this point clear, I say that by the custom of London common brokers, factors, or leigers, have been restrained from exercising that trade or faculty without approbation. And so this constitution in the substance of it is no more than what was the ancient custom of the city. This I shall have occasion to prove anon by several records; such I think will evidence not only the custom for factors and brokers to be approved, but the other part also for taking sureties by recognizance, and for the condition of those recognizances and suretyships. But as to this in particular, it appears by the statute 1 Jac. c. 20, that for "divers hundred years freemen of several misteries have been elected and presented by six persons of the mistery to the Lord Mayor and Aldermen, and sworn to demean themselves uprightly between merchant English, and merchant stranger and tradesmen, in the making and concluding bargains and contracts, to be made between them concerning their wares and merchandize to be bought and sold and contracted for in London;" and these have anciently borne the names of brokers. The very same office which they now call factors is part of that office which they formerly called brokers, as I hope to make appear anon. Some trades have their sworn brokers at this day: but not the clothiers, who being foreigners have no particular companies here. And, therefore, their factors not being subject to the rules and regulations of particular societies and companies as trades are, it is but just that the Lord Mayor and Aldermen have a particular inspection over them; and if the custom was that they should be first presented by some of the companies, and then approved by the Court of Mayor and Aldermen, it is not against law; nor hath the defendant cause to complain, if the approbation of the Mayor and Aldermen be required, though such presentation and election be not made unto them by other freemen. And by Andrew de Vine's case, which I mentioned before, and shall more at large hereafter, it appears that *(al*

The same office which is now borne by persons called factors, was anciently borne by those called brokers.

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antiquo) none should be a common broker, or maker of bargains, nor *de contractu sive bargando quocunque inter mercator. et mercator. facere, tanquam communis abrocator, seu mediator intromitteret quoquomodo*, till he were admitted by the Mayor and Aldermen.

Having thus far enlarged upon the two great grounds of this ordinance, the custom touching foreign bought and foreign sold, and that the public factors or brokers ought to be approved; I shall now examine, first, those objections which have been more particularly made against the branches of this act of Common Council, ordinance, or by-law, which concern factors only:—next, I shall touch upon those which concern cloths and hallage, and the other particulars mentioned in the act of Common Council, which have been excepted against; but withal I shall consider whether, if that part of the act of Common Council which concerns factors be good, and that the defendant Hutchins hath offended against it, the action of debt in the return mentioned being brought upon that part only, whether supposing some other parts of the act of Common Council to be against law, it should vitiate the whole act of Common Council; and so the action not to lie. For if they are wholly independent clauses, and one do not make void the whole, the exception against the residue of the ordinance which doth not concern factors will not be material in this case, which concerns only a factor for acting as a factor. And then I shall consider these other things which have been urged, that there appears not any breach of this act of Common Council.

As to the first, the objections to that part of the act or ordinance which concerns factors are these:—first, the act is, "that none shall be admitted, permitted, continued, or allowed as a factor, unless he shall be at first approved and admitted by the said Court of Lord Mayor and Aldermen." Against this it hath been said, *first*, that it appears not that there is a Court of Mayor and Aldermen, and then it is impossible to have any factor approved. Secondly, if there be such a Court, yet if it be not such *time out of mind*, their custom of supplying defects in former customs cannot extend to it. This last I clearly deny; for admitting it were a *new Court*, since it consists of members of their corporation, the regulations and government of their old customs and franchises may be by their ordinances so applied to this new Court. If new companies be made in London, the regulation of them comes within the compass of the liberties, customs, and franchises of the city. As if new statutes be made concerning trade or the like, the

The old customs and franchises of the city of London may by their ordinances be applied to new courts consisting of members of their corporation. If new companies be made in London, the regulation of them comes within the compass of the libertics, customs, and franchises, of the city.

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regulation of trade in London according to those statutes shall be under their cognizance.

London resembled to counties palatine; and the Courts at Westminster ought to take notice that there is in London a Court of Mayor and Aldermen,

Secondly, I say we ought to take notice that there is a Court of Mayor and Aldermen. London is to be more resembled to counties palatine, where we take notice that they have Courts of Chancery, Common Pleas, &c. than to other corporations.

But, thirdly, In the very clause next precedent to this of factor, there is express mention of the Courts in the Guildhall of the city before the Lord Mayor and Aldermen; and this very clause concerning factors is, unless he shall be first approved by the said Court of Lord Mayor and Aldermen. But, to make it more clear, it appears upon this very record, that this very suit is depending in the Court before the Mayor and Aldermen, and said to be held *secundum consuetudinem civitatis*, *&c.* therefore upon the return it judicially appears to us that it was a Court held time out of mind.

Secondly, It was objected, that a factor is but a servant; and it is against law, and the liberty of the subject, that a man may not employ his own servant. By the same reason he may be restrained having his own cook, or brewer. And, secondly, that this tends to introduce a monopoly; for be a man never so fit or well qualified for it, it is in their power to exclude him and all others without any reasonable cause; and, though he were a factor before, he shall not now be continued or permitted, unless so approved. To which I answer, that the act of Common Council doth not prohibit a man to use his own servant for buying or selling at Blackwell Hall, but one that is a common factor, or dealer for others, no more than the statute 5 Eliz. that prohibits a man to exercise the trade or occupation of a cook, baker, or brewer, that hath not been apprentice, prohibits a man to bake, or brew, or dress meat in his own house. Also I conceive if two men are joint partners, both foreigners, for a citizen cannot sell in Blackwell Hall, and one buys cloths upon the partible accompt in the country, and sends them here to the other, who lies leiger here, and sells them here, this man is not restrained by this ordinance or act of Common Council; nor I conceive can be restrained by law, for he sells only his own cloths. It was objected by my brother Archer that this act of Common Council extends to copartnership: but, upon view of the act itself, I conceive it is otherwise. It recites that many freemen are *in shew* the buyers in these markets, but in reality instruments for foreigners: it declares such practices to be contrary to the customs and privileges of the city, and that such buying of commodities in the market by a freeman for the use of a foreigner, either in copartnership, or otherwise, is colouring of foreigner's goods,

If one of two joint partners, being foreigners, buy cloths on the partnership account, and sends them to the other in London, he may sell them in Blackwell Hall here without being an admitted factor.

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and contrary to the oath of a freeman; and inflicts a penalty in such cases. This I take to be good; for a foreigner ought not to buy in those markets, as I have shewn before. Then if a foreigner be a copartner with a freeman, the buying of the freeman is the buying for the foreigner, and is against the express words of the custom against foreign bought and foreign sold; and, if it should be admitted, would wholly elude the custom: but if there be two copartners (for instance in the trade of Welsh cottons,) and both are foreigners, the one buys the commodity below, and sends it up to his partner, who sells at Blackwell Hall, this is not within the meaning of this act of Common Council; for he sells as owner, not as factor or broker; for a factor in those halls is one that sells for others, and mediates bargains between buyers and sellers; and hath brokerage and factorage for the same. And the word *broker* here is synonymous with the word *factor*, and signifies the same thing in its proper sense, as I shall shew anon: it includes this of a factor, and more. We now indeed call him a broker, not only who mediates in bargains, but who patches up old clothes and things, and sells them again, which is now the chief part of our common brokers' trade at this day: but these, as the statute 1 Jac. 21. saith, are rather friperers than brokers: but he was anciently not only *abrocatorius*, but *correctarius*, and his wages, *correctage*, as well as *brocage*, as appears by Andrew de Vine's case hereafter cited, and divers others; and though in this ordinance the word "leiger" is added, yet that must be taken also synonymous for one that lies leiger or factor for another, and not one that sells his own goods. And if it should be otherwise expounded, I think it is against law and justice; for no man that will sell his own goods ought to be compelled to let another sell them for him if he will do it himself. But that a man, if he will use factors in Blackwell Hall, may be restrained to public, and allowed factors, is agreeable both to the rules of law, and to former customs and reason.

1 Jac. 21. speaks of that broker.

A man may be prohibited to use any porter at Blackwell Hall, but sworn and known porters; I mean to carry from the market to the warehouse and back again; I mean not flying porters to carry abroad. Custom hath restrained a man to use any common baker in Torcester but the Lord's; Sir George Farmour's case. Or to use the art or mystery of a dyer at Ripon, *sine licentiâ Archiepiscopi Ebor.* Lord of the town, *vel predecessoris aut ballivorum suorum ejusdem villæ*; and 2 Cr. 597., Broad and Jolliffe's case, a prescription to restrain one from using a trade in such a place is good. And in many places, by prescription or custom, men are restrained from grinding at any other mill but the Lord's mill. This very

8 Co. 242. Prescription to restrain trade.

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custom, that there shall be no foreign bought or foreign sold, being allowed good, proves the lawfulness of the restraint of factors; for by that custom freemen only can buy and sell in London, only by retail; and none can be a freeman but he that is approved, and his freedom allowed by the Lord Mayor or other officers. And the objection that is made here, that it is by this means in their power to make a monopoly, and exclude whom they see cause, holds in that case of a freeman, and almost in all cases where any thing is referred to the magistrate. But the law presumes he will do no wrong, and thereupon entrusts him with power. What if the clerk of the inrolments will not inroll a bargain and sale, or a recognizance, or a cursitor refuse to make an original,—may another do it? or the officer of the city refuse to grant an apprentice-ship freedom? It is but just that the Mayor, &c. who have power to regulate a trade, have power also to appoint who shall be their officers; and this case is so much the more reasonable, for that it leaves it not arbitrarily to the power of any single person, but of the Court of Mayor and Aldermen, who, it is to be supposed, will do that which is honourable and profitable for the city and the kingdom.

The law presumes magistrates will do no wrong; and, therefore, entrusts them with power.

This objection hath been enforced, that this is against *Magna Charta*. And that it being left *ad arbitrium*, whom they will admit to be factors, they may refuse any persons without reasonable cause; and the plaintiff hath no remedy, if this ordinance stand good. As for *Magna Charta*, if it be a custom, it is confirmed by *Magna Charta* by express words,—*Civitas Lond.—habeat omnes libertates suas antiquas et consuetudines suas*. But if there be a custom in London against common reason and natural equity (though it be confessed by pleading to be confirmed by act of parliament, 7 R. 2.) yet it is not allowable; both because it is none of the customs intended, and because even an act of parliament made against natural equity, as to make a man judge in his own cause, is void in itself. And it is said in Wagoner's case, "There are divers customs of London which are against common right, and the rule of common law, and yet are allowed, *eo potius*, because they have not only the force of a custom, but also supported by authority of parliament." And here are three customs:—that of foreign bought and foreign sold;—that of factors to be approved;—that of supplying defective customs by ordinances; all concurring to

Hob. 87. Day and Savage.

An act of parliament against natural equity, as to make a man judge in his own cause, is void in itself (*m*). 8 Co. 125.

(*m*) In a treatise on the exposition of statutes by Sir Christopher Hutton, it is stated that parliament may err; "and though there be no court higher to convince, or pronounce upon the error, yet, when the matter is plain, every judge may esteem of it as it is, and being void, is not bound to allow it for good and forcible."

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make good this part of the ordinance, "that public factors ought not to meddle in Blackwell Hall, unless so approved." It is objected that it is unreasonable that none shall be factors but at the pleasure of the Mayor and Aldermen. I deny it is unreasonable: if you put the case of public factors, as I have said before, *per tenorem*, a servant is not restrained, nor the person concerned as a partner in the cloths. The case of 2 H. 4. 24., which was of tenants having a common after corn carried away; but that none shall put his beasts in till the lord shall have put his beasts in, is no good custom, for they had a right of common; and where there was a right, there was reason there should be a remedy. So he that was elected constable of vestrymen had a right, by that election, and may have his *mandamus*. Passuring is no trade; and to prohibit it in such and such places, is no hindering a man of his trade. But, in our case of a factor, one man had no more right to be a factor than another; and he that will come to such an employment, must come to it upon the terms and conditions which are limited for it by law or custom. Is it not a good custom, that none shall be a general attorney in this court, unless he be admitted by the court? That none shall be an attorney in the court of London, but one of the eight there sworn? And whereas my brother Archer objected, so they might have a custom, that none should be a lawyer there but whom they please. I answer, I think the use is, none shall be a public constant lawyer there but the common pleaders. But every man may in his own cause have his own counsel. Is there not in London a general prohibition by their customs, for any one to sell by retail, unless he be a freeman? And is any man a freeman, unless he be admitted by them? My brother Brown cited a case and admitted it to be good law, that a constitution, that none should be a

In the Mayor's Court of the City of London, the use is that none shall be a *constant* lawyer there but the common pleaders. But every man may, in his *own* cause, have his own counsel (*n*). It is a good by-law, that none should be a cooper in London before he has made a piece of work, to be approved by the warden of the company; and if the warden will not approve a man, he hath no remedy but by complaint to the Mayor and Aldermen.

(*n*) It is said that the common pleaders of the city claim to be exclusively entitled to appear in the city courts; and in the third edition of the book, called *Privilegia Londini*, p. 291., it is stated that "a bill in the Lord Mayor's Court of Chancery must be drawn and signed by one of the four city counsel." In Emerson's Treatise on the Courts of Law of the City of London (1794), p. 36., it is said, that "*all* the City Counsel must be feed, on behalf of one party or the other, *before* any foreign counsel, *i. e.* one not of their body, can be admitted to plead in any cause or motion depending in this court."

But it is understood that a bill in equity, signed by a barrister, not being one of the common pleaders, will be received in the Lord Mayor's Court. And query, if a *by-law* to exclude parties in the City Courts from the general means of *defence* by counsel would not be bad.

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cooper there, before he had made a proof piece. A proof piece is a piece of work to be approved by wardens of the company. I have seen divers orders to that purpose of other companies. What if the wardens will not approve him? He hath no remedy but by complaint to the Mayor and Aldermen. The case is the same where the approbation is to be immediately by the Mayor and Aldermen.

So that, first, it is a reasonable provision to prevent foreign buying and foreign selling, and to prevent deceits in selling of clothes at the market at Blackwell Hall, that the factors be allowed by the Mayor and Aldermen. Secondly, it is an equal provision; for freemen as well as strangers are restrained. Thirdly, It is not for any private end; the benefit of the forfeiture goes only to the hospitals.

The third objection is, that the custom, or act of Common Council, that none shall be admitted, permitted, continued, or allowed, as a factor and in the said halls, unless he shall first enter a recognizance to the Chamberlain of 200*l.* not to buy in the said markets, or to sell out of them, any of the commodities aforesaid, during the time he shall continue a factor, is against law. It was said, this was to condemn him before he be found faulty; and it extends to his body and lands. In Waltham and Austin's case, an ordinance whereby cloth shall be forfeited, and in Clark's case, whereby his person shall be seised on and imprisoned, is void. To this I answer, if it be a good act of Common Council to prohibit any to be factors, but such as shall be approved, it is good reason caution should be given, that those, who are so approved, should do their duty. It appears in the said case of Andrew de Vine, 34 H. 6., that the custom was, that all brokers should find manucaptors, which is more than this ordinance requires; for it requires only his own recognizance. By the custom of London recognizances may be acknowledged; and the Chamberlain brings his action upon them. And it is usual to have such recognizances for orphanage money. A recognizance at common law was but a bond acknowledged: if the statutes have made land liable, that alters not their power or usage to take recognizances, which are but bonds recorded. Agreeable to this is the practice in other courts, which the common law allows. In the admiralty they take bonds in marine causes: so in the ecclesiastical courts, bonds of executors or administrators for exhibiting inventories, &c., which are good, and cannot be prohibited; and writs prohibitory were granted to the sheriff, that he should not suffer laymen to come to any place at the citation of the Bishop, "*ad faciend. aliquas recognitiones, vel sacram. præstanda*, nisi *in causis matrimonialibus vel testamen-*

8 Co. 124. 5 Co. 64.

4 Co. 65. Fullwood's case.

A recognizance at common law was but a bond acknowledged.

Reg. 36, 37. F. N. B. 41. a.

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viis:" and there are many prohibitions in the register *de recognitionibus*, nisi *in causis matrimonialibus vel testamentariis;* which proves that where the matter is conusable in that court, they may take recognizances, or bonds in relation to that business. And in some cases they may sue upon such bonds or recognizances in the same court: and, therefore, "if a man, by reason of matrimony or testament, acknowledgeth in the court Christian, that he ought to pay 100 marks at a certain day, if he do not pay it at the day, he may be sued in the Court Christian for this, (or at the common law) upon a bond taken for it; and no prohibition lies." So, if a man be excommunicated, and imprisoned for it, the ecclesiastical court may take security from him *de parendo mandatis ecclesiæ in forma juris;* and they may either be *cautio juratoria*, or *fide jussoria*, or *pignoraticia*, by mortgage or pledge; for so the express words of the register commanding the sheriffs not to deliver him out of prison, "*quousque cautione pignoraticiâ adminus eidem episcopo de satisfaciendo obtulerit,*" or by sureties, or by his oath. And if the Bishop do refuse to accept of such caution, a writ *de cautione admittendâ* lies, supposing that he had offered *idoneam cautionem de parendo mandatis ecclesiæ*, which was refused. And indeed the word *cautio* is a proper word of art for a bond or recognizance in the civil law. In the 16th of St. Luke, 6th verse, in the parable of the unjust steward, where we have it in English, *Take thy bill and write down fifty*, the vulgar Latin hath it, *Accipe cautionem.* Upon which Grotius observes, "*optime Latinus interpres* cautionem *vertit; ita enim jurisconsulti vocant quod Græci syngrapham aut chirographam.*" So that the writ *de cautione admittendâ*, is a writ commanding to take a bond, or a mortgage. And by the same reason as the ecclesiastical court or admiralty may take a bond or recognizance for a matter of their conusance, by the same or rather with much more reason may the Court of Mayor and Aldermen who proceed in their suits according to the rule of common law, take a bond or recognizance from such as are to be approved factors, for the performance of their duties in their offices.

F. N. B. 41. b.

Reg. 66, 67.

Reg. 67.

Grot. in loc.

Fourthly, It was objected that the recognizance was unreasonable in the penalty; for the offence may be but 2*d.*, and yet the forfeiture 200*l.*: and divers cases were cited that there ought to be *moderata* "*amerciamenta*," (*o*) *et amerciamenta* "*liberi hominis*" *salvo contenemento*; for a villein *salvo way-*

44. a.

(*o*) The words "*liberi hominis*," are here inserted from *Magna Charta*, c. 14., and "*amerciamenta*" by conjecture. The marginal reference seems to be to 8 Co. 40.

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nagio. But that receives an answer; an amerciament is for an offence done: but these recognizances are cautionary securities to prevent it. And because the particular quality of the offence cannot be known, it is reasonable to have such a penalty as may deter others from breaking it.

An amercement for an offence done distinguished from a recognizance entered into by way of cautionary security.

As to the matters of the recognizance, that it appears not, whether the defeasance of the recognizance shall be contained in the body of it, or in a condition. But the words are, "that no person shall be admitted a factor, unless he be approved, &c. and shall enter into a recognizance that no such factor shall in any sort, by himself, &c. buy in either of the said markets, or sell, or cause to be sold out of the said markets in his own, or in the name of any other, any of the commodities aforesaid, so long as he shall continue a factor." This, according to the usual practice, must be a recognizance with a condition, not a defeasance: but if it be confirmed otherwise, it is all one to our case, for the prisoner hath done neither.

Secondly, It is said that he is bound not only for himself, but all other factors who shall be admitted; for the words are, that he shall enter into a recognizance (not that he himself shall not buy, but) that no factor shall buy, &c. which extends to all factors to be approved and admitted. But that is a strange enforced exposition. It must be taken respectively, *et reddendo singula singulis*, that no such factor so entering into a recognizance shall buy, &c. 6 Jac. Shoyle's case. The statute 5 Eliz. c. 4. enacts, "that it shall not be lawful to any persons, other than such as do now use any art, mistery, or manual occupation, to set up any art, mistery, or manual occupation, except he shall have been an apprentice thereunto seven years." It was said he that used one trade at the time of that statute might, by that clause, use another: but it was adjudged to the contrary, that the general words shall be taken respectively, that is, he may use that trade only which he then used, and in which he is supposed to have had knowledge, though he had not been apprentice to it, and not another.

3 Co. 129.

Thirdly, It was objected that this extends to foreigners, and they have no power over foreigners.

The city of London has power over foreigners for matters of trade within their liberties.

They have power over foreigners for matters concerning trade done within their liberties. So resolved in the case of the Chamberlain of London.

But, fourthly, The main objection is, that the condition is, that whilst they act as factors, they shall not buy or sell for themselves, though freemen; and many act as factors and merchants also; and this is to take away the liberty of the subject, and of freemen.

The restraint is not for buying or selling generally, but buy-

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ing or selling those kind of commodities for which he is a factor; for that is the way to deceit and cozening by commodities not vendible, and the other is the way to prevent it. For men will not be so inclined to cozen and cheat for other men as where it concerns themselves.

But now for further answer to all these objections against this act of Common Council as relating to the factors. I say there is nothing in the act or ordinance, but what is warranted by the ancient customs of the city, and by former acts of Common Council grounded upon those ordinances. I begin with that case which was cited at the bar,—Andrew deVine's case, 24 H. 6. The case was in Chancery, and the original record is not to be found: but the city register book, out of which it is taken, is of a hand about that king, or King Edward the Fourth's reign, called *Liber Dunthorne*; (*p*) which also contains an extract of divers other ancient records, which I shall make use of, and refer to the pages wherein they are registered. It was objected that case was pleaded in English: but this writ, return, and judgment, were in Latin; the other was but to satisfy the Court *de veritate facti*.

24 H. 6. Vine's case, Dunth. fol. (237. b.) 238. a. (*q*)

That case was thus:—Upon an *habeas corpus* out of the Chancery it is returned, that according to the ancient laws, liberties, and free customs of the city,—provisum et ordinatum fuit ab antiquo, quod nullus, in futurum, officium seu occupationem communis correctarii seu abrocatoris in civitate prædictâ aliquo modo exerceat, neque super se assumeret, nec de correctagio seu abrocagio hujusmodi, aut de contractu seu barganeo quocumque inter mercatorem et mercatorem faciendum in civitate prædictâ tanquam communis abrocator, seu mediator hujusmodi se intromitteret, quoquo modo, quousque per Maiorem et Aldermannos civitatis præd. pro tempore existentes ad hoc faciendum et exercendum *admissus* fuit; et juratos et sufficientes manucaptores ad se bene et fideliter habendum et gerendum in officio sive occupatione prædict. invenerit; secundum uniformam et effectum libertat. et consuetud. præd., sub

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(*p*) Liber Dunthorne is kept in the office of the town clerk of the city; and by his courtesy the Editor has been enabled to supply the references to the pages which were omitted in the manuscript. In the title page of a book called "The City Law" is the following note, thought by Mr. Hargrave to have been written by Sir Martin Wright; "Englished out of an ancient French manuscript *called Dunthorne, an ancient* book in French, in which the customs were registered. It was allowed to prove a custom, Skinn. 649. Vid. Comb. 383." The book in which this note is written is in the library of the Inner Temple; Mr. Hargrave's copy is in the British Museum.

(*q*) The case begins in fol. 236. b.

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pœnâ imprisonamenti, et faciend. fin. ad opus communitatis civitatis præd. For breach whereof, after prohibition by the Mayor and confession of it, he was imprisoned. And this was adjudged a good custom, their customs being confirmed by parliament and by the Archbishop of Canterbury, then Lord Chancellor, by the advice of the two Chief Justices Fortescue and Prisott, Nicholas Ashton, *et ceter. regis justiciar.*, and the Master of the Rolls; and upon view of the charters, liberties, statutes, ordinances, records, and provisions of the city in this behalf, *ex antiquo fact., et approbat., decretum et ordinatum fuit per eosdem, authoritate curiæ præd., quod præd., Andreus de Vine in plenum allocat., affirmat., corroborat., et approbat. libertates, statuta, ordinata, jura et provisiones civitatis præd. in eâ parte fact., remittatur.*

Which case I shall make use of not only as an authority in law, but as a full evidence of the fact, that at that time it was according to the liberties and customs of the city *de antiquo* that there should be no brokers or factors within the city but such as were approved by the city; and that they should be sworn, and put in securities to perform their duty.

It was said by Justice Brown, it was a pecuniary mulct in this case: but it appears to be mistaken; it is imprisonment also. It was said by Justice Archer that case was not of a factor, but broker between merchant and merchant. It is part of the same office, the nature of the office not altered by new words.

St John's case,—33 H. 8., prohibits carrying a hand-gun; a dag is within the act; for it is not of any new kind in substance, but hath only a small alteration in form and quality. And it appears by the words of the act of Common Council they are intended for one and the same persons, a factor broker, or leiger in Blackwell Hall and Leadenhall, a common buyer or seller of cloth there for other men. And therefore the case of the factors at large, or of a leiger, and what they signify in propriety of speech, as I conceive, reaches not our case. A factor at large may buy as well as sell; so cannot a factor at Blackwell Hall.

There are no other brokers at Blackwell Hall for cloth than those now called factors. The name of broker, by reason of fripperers and those who buy old goods to sell again, being grown out of credit, they mollified this by the name of factor which, though it be an old word, yet in application to selling of cloths is new, and not to be found in our ancient statutes.

4 Co. 84. Southcot's case.

Multa renascentur quæ jam cecidere; cadentque
Quæ nunc sunt in honore vocabula. ———

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In the Parliament Roll. 50 E. 3., the citizens complain of the breaches of their privileges; amongst others, que chescun estranger poit demurrer en le city, et tenir hostel et estre brocoar, et vendre et achater touts maners merchandises a retayle, et estrange vendre al estrange pur revendre. And thereupon the King grants, que nul estranger teigne hostel, ne soit brocour, ne vende ascun marchandises a retayle deins le dit city, 50 E. 3. Rot. Parl. 143. but in the printed abridgment, 134 (*q*).

(*q*) In the folio edition of the Rolls of Parliament, vol. 2. p, 347. the marginal number is 84., and the number of the title is 143.

The Abridgment referred to in the note in the margin of this page, which is in the hand-writing of the original manuscript, seems to be that *usually* called Cotton's abridgment. As, however, Sir Orlando Bridgman does not attribute it to Sir Robert Cotton, the following conjecture by Mr. Hargrave, as to the real authors, may be useful in establishing to whom the praise of the work is due, as well as its authority .—" On the first side of this blank leaf there are some memoranda, from which it appears that this Abridgment, which Prynne ascribes to Sir Robert Cotton, was not by him, but by William Bowyer and Robert Bowyer.

" The Memoranda are,—

" *The Parliament Rolls, de annis* 21 E. 3., 46 E. 3., 8 H. 5., *and* 20 H. 6., *were not abridged by William Bowyer, the first collector; wherefore I have abridged them by the record, and written them into this book in the proper places.*

" *Ro. Bowyer.*"

" *The note or memorandum abovementioned is in a manuscript copy of this book, in the Heralds' Office, collected and writ by the abovenamed William Bowyer, and not by Sir Robert Cotton, as Mr. Prynne by mistake has suggested.*"

" In the Catalogue of the late Mr. Serjeant Adair's law-books, one of the manuscript volumes in folio contains a collection very similar to this Abridgment of the Rolls of Parliament. The title of the volume is, ' *Medulla Parliamentalis, containing all the bills, acts, and other material passages whatsoever, recorded in Parliament sithence the reign of King Henry the Second, untill the first year of King Richard the Third.* 1622.' After this title there are arms emblazoned with the following subscription:—' *Insignia Edwardi Gwynn gentilitia, Medii Templi socii.*' The book is in excellent condition, and the MS. is uncommonly fair. It was bought 21 Nov. 1798., at the auction sale of the Serjeant's books, by Master Orde. From a slight inspection of the book, it seems to me not improbable, that this book may be almost the same as the Abridgment here; for, though the title professes to go as far back as Hen. 2. it contains scarce any matter prior to Edw. 2. F. H. 22 Nov. 1798." MS. note to a blank leaf in the Hargrave copy of the 1st edition of the Abridgment.

Sir Simon D'Ewes in his preface mentions, amongst the authorities from which his Parliamentary Journals were selected, " A large MS. Abridgment of all the original Journal Books of the Upper House, during the reign of Elizabeth, very faithfully for the most part collected and transcribed with his own hands, by *Robert Bowyer*, Esquire, who continued clerk of the said house, *ab an. 6 Jacobi Regis*, to 18th of the same King."

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ou les suburbs de cel, nient contristeant ascun statute ou ordonnance fait al lencontre.

Whether upon consideration of this statute, for so it is, it extends only to such strangers as are aliens, may be some doubt. But it serves to my purpose, first to shew that it was an ancient franchise to restrain strange brokers to sell and to buy; and in the Parliament Roll, 51 E. 3. Rot. Parl. No. 32. (*r*), it appears there was a charter granted for the other liberties mentioned in this of 50 E. 3., which is *in hæc verba* in the Parliament Roll.

And, 2dly, to shew that a broker was not only a mediator of bargains, but one that sold and one that bought, and by that statute he was forbidden to sell by retail. In Andrew de Vine's case, which I cited before upon that return, that none ought to exercise the office or occupation of a common broker, before he be approved, it is set forth that the said Andrew, "*officium communis abrocatoris pro diversis contractibus et barganeis per ipsum fact. et format., in civitate præd. sæpius exercere curavit, et super se assumpsit; pluresque contractus sicut communis abrocator in dies fecit, &c.* (*s*); and when he replies to it, he only sets forth, "that all merchants may sell their merchandizes as well by foreigners as denizens (*t*);" which sheweth that the selling of other men's goods (which we now make the factor's office) they took to be the office of a common broker; so that I take the office of a factor and broker in Blackwell Hall and Leadenhall to be all one; at least that a factor's office or occupation is that of the ancient office of broker or corrector: which being admitted, then I say, that by the records of the city, some of which I have seen in the same book called Dunthorne, I find there is nothing in this act of Common Council, relating to the factors, but what was in effect the former usage of the city; and that this act is but as a system or collection of the former customs and ordinances of the city, as it is set forth in the preamble; and, therefore, 10 E. 1. (*u*) amongst the articles *de statu civitatis*, confirmed by the King, *sub magno sigillo*, "none shall be brokers within the city, but those who are received and sworn before the gardier (the warden of the city when there was no Mayor) or Mayor and Aldermen, 21 E. 1. the names of "the brokers sworn and

10 E. 1. C. fol. 15. 45. 110. (*v*).

(*r*) And No. 16.

(*s*) In *liber* Dunthorne, 237.

(*t*) ——————— 237. *a.* & *b.*

(*u*) This statute is stated in a note of the reporter, in *ex parte* Dyster, 1 Merivale, 174, to have been referred to by the Lord Chancellor, as 13 E. 1., stat. 5., by which date it stands in the Appendix to Ruffhead's edition of the Statutes.

(*v*) In *liber* Dunthorne, 294. *b.*

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elected *ad officium lanarii et drapii*; the like, 17 E. 1. *ad officium abrocatoris de mercimoniis tempore J. le Bretoun custodis Londini.*

(*x*) The Sheriff of London brought an action of trespass against John de Cornube, for making himself a broker, and bringing a foreigner to another foreigner of Bedford, to buy wool against the privileges of the city; for which he was disfranchised; and customs were to be taken of him as of a foreigner. 21 E. 1. 17 E. 1. 1 A. 110. D. 111 (*y*).

I find, *anno Regis Edwardi* 19., (which must be understood of King Edward the First), which recites a former ordinance, *anno* 16. that no broker be suffered to meddle as broker within the city, devant que il fuist accept devant le Maior en la Gyhalle, et jurre que il ne voit medler de chevisance, d'usure, ni d'auter bargain d'usure, mes que il se doit bien et loyalment porter come loyal correctour sans medler a merchaundes a son use proper (*aa*), et que il prendra pur brocage de nul contre ceo que est ordeigne per la del city. Item que nul home estrange serra accept d'etre corrector, s'il ne face fine, et pay al chambre de la Gyhall quarante sous annualment, et trove 2 ou 3 sufficient pledges, quant il serra acceptes, et jure de faire en manner superius dite; et que nul denisen, n'autre, ne serra accept d'etre correctur, devant que il fac fine et pay come entre le Maior, le Chamberlain de la Gyhall et lui poient accorder, et soit jurre, et trove pledges de faire en manner superius dit., et si voel medle de correctage de deins le dit city encountre l'ordinance superius dit cy a la prison, et oustre ceo, puny solongue la discretion des Maior et Aldermen; and infinite precedents there are of admittances of brokers, suing and punishing of brokers, for meddling in being brokers of such things, whereto they were not elected and admitted *secundum consuetudines civitatis*. F. 110 (*z*). 19 E. 1. Rot. Stephani Abbington. Rot. 1 temp. Ed. 2. *videtur et* H. fol. 16. et 29 (*b b*). J. 275. 9 H. 5. (*c c*). 6 R. 2. H. 155. (*d d*). 13 R. 2. H. 247. (*e e*). 2 H. 4. H. 66. (*f f*). 31 H. 6. K. 166. (*g g*).

And in the successive times of E. 2., E. 3., R. 2., H. 5, 6, 6., there are ordinances, precedents, and actions which prove the custom of approving and swearing brokers, and for their finding pledges and sureties; and by some of them that they must be admitted by the mystery, and presented to the Mayor and

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(*x*) In *liber* Dunthorne, 224. *b*.

(*y*) *Ibid.* 225. *b*.

(*z*) *Ibid.* 226. *a*.

(*a a*) In *ex parte* Dyster, 1 Merivale 174. "the consequence, in point of law, of a city broker, trading on his own account," is considered; and the later enactments noticed.

(*b b*) In *liber* Dunthorne, 227. *a*.

(*c c*) *Ibid.* fol. 233. *a*. and 230. *a*.

(*d d*) *Ibid.* 228. *b*.

(*e e*) *Ibid.* 139. *a*. and 229. *a*.

(*f f*) *Ibid.* 229. *a*. and query if H. 16.; and see fol 66.

(*g g*) *Ibid.* 234. *a*.; and query if K. 266.

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Aldermen; and that they shall not meddle in buying and selling any manner of merchandize to their own use, and that rates are assessed which are to be allowed and taken for brokage.

In rot. W^l. Cromer, 3 H. 6.

And so for recognizances by brokers; 3 H. 6. when Cromer was mayor, a recognizance in 5*l.* was given by R. Coroner, and R. Darnell his surety; and many other recognizances in that roll are to be found entered into by factors for the due execution of their office.

By all which several precedents, and many more of the like nature may be found, it appears that what is directed or appointed by this act of Common Council concerning factors, as that they shall be first approved, that they shall not buy or sell for themselves, that they shall enter into recognizances, was the ancient custom of the City before this act was made. And though the City books are not legal evidences, yet there can be no better evidence of the fact than those ancient chartularies, which cannot be supposed to be *contra veritatem facti*. And that precedent of Andrew de Vine is a full and express judicial authority, as may be, upon general advice with all the judges: and though the record of it cannot now be found; yet being transcribed in so fair a ledger, by a hand of those times, we have reason to give as much credit to it as to the printed Year Books of H. 6. or E. 4., which came transmitted to us by no greater authorities than such manuscripts.

Weight of the City chartularies as evidence.

Weight of precedents, where the record is not to be found.

For authorities of later times there is scarce an ordinance in London for the government of the City now in force, against which there may not be the same exceptions, or greater, than have been made against this. I have seen several acts of Common Council, down to the time of this very act, providing remedy in some or other of these particulars. And, for ought I know, it was never before disputed. It is true, P. 21 Car. C. B., the case was,—The Company of Horners made an ordinance to restrain any freeman from buying horns within twenty-four miles from London, but such as the company should appoint; and this was held to be naught. The reason was, it was but an ordinance or by-law of the Company, and not an act of the Common Council, nor bottomed upon any custom, or confirmed by act of parliament. But Mich. 1656., in the said Court of Common Pleas, between the Chamberlain of London and Osbourn, upon a *habeas corpus*, and return made of an act of Common Council, that there should be a certain number of carmen; and that so much should be paid for a fine upon ad-

The Company of Horners and Baker's case. Cory's Rep. MS. 227. 230, 231. Note by Mr. Umfreville (*h h*).

(*h h*) The case is also reported in 3 Mod. 158. This manuscript is in the British Museum. Harg. MSS. No. 23.

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mittance, and that none should work with a car but such as were appointed by a committee of woodmongers; and there, though it was urged that this is not a regulating of trade, but a restriction, where the law gave liberty, yet it was adjudged a good return, and a *procedendo* awarded.

Against this it is objected, that Payne and Houghton's case was contrary to it, Pasch. 42 Eliz. B. R.: but my brother made a difference between the cases; for he said that in Osborne's case there it was expressly set forth, that by custom they had the rule and government of all carmen, and allowing and disallowing the number of them, and the rates which they were to pay. So it appears the one case was bottomed upon a custom; not the other case.

In that very case of Osborne, Payne and Houghton's case was cited; and it was said that the case was not upon a return, but upon a justification in trespass brought by some carmen, where the charter of 15 E. 3., for making by-laws, was alleged, without alleging a custom for it; and, therefore, the justification was not good.

H. 8. Car. C. B., Nicholas Barker's case, upon a *habeas corpus;* a custom was pleaded within the City, that they have used to appoint porters, freemen of the City, to carry coals, corn, and other similar commodities, from such and such wharfs to ships, and from ships to wharfs, who were called porters of corn and salt; which porters were and ought to be attendant and ready to execute the said portage, and ordinances for them by the Common Council, and to appoint reasonable penalties to be forfeited by such as should deny or refuse to pay the said fees, or should carry away the said corn, &c. without a bill from the Mayor, and payment of the said fees for fillage and portage. And set forth an act of Common Council for that purpose, and a plaint affirmed in the Court before the Mayor and Aldermen (as it is here) for the penalty; and, after several continuances and advisement, it was awarded that a *procedendo* should issue. The difference between that case and ours is, there was a particular custom alleged in the body of the return, to have such porters; ours appears but implicitly: but in neither is the custom recited in the action by the Chamberlain. The truth is, the shaking this act of Common Council in consequence reacheth to the destruction of the whole government of the city, which depends upon regulations made by such Courts. The several markets for beef at Leadenhall; for other flesh at Cheapside, Newgate within, and shambles; the wheat market; the markets for poultry; fish markets; meal markets; fruit markets; iron and cutlery wares; cattle;

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wool; cloths; have been, by act of Common Council, restrained to certain places: and fishmongers, butchers, poulterers, &c. not to sell but at the places aforesaid.

The same reason there is for restraint of persons, as places for public buying and selling; and times within which they should buy and sell; and trades with which they should meddle, and with which they should not meddle; as that a dyer should be no clothier, nor a butcher a tallow-chandler, without the aid of and before the statute of 5 Eliz. So the carmen, draymen, porters, coblers, musicians, exchange brokers, retailing brokers, farriers, watermen, and generally all other trades in the city, have had their regulations and restrictions from the Common Council, and Court of Aldermen: and so generally men of all other trades and employments in the city, till they have been admitted to become brotherhoods; and afterwards to obtain charters, with powers to choose governors, and officers for regulation of their own mysteries; subject nevertheless to the Mayor and Aldermen, &c. And these restraints have been as great as in our case.

The city book of *habeas corpus*, cited.

Acts in Common Council have been made to restrain the white bakers from being brown bakers, *et è converso*. Archer's case in the city book of *kabeas corpus*, 86, 12 Junii, 9 Jac. B. R. Upon a *habeas corpus* for Litlepage, they return that there have been time out of mind two several mysteries of white bakers and brown bakers, and that 6 E. 2., the Mayor and Aldermen ordained that no white baker should bake brown bread, and *e converso*. That against this order, he being a white baker, did use both trades, and being convented before the Mayor and Aldermen confessed it; and being required not to do it any more, said he would bake both white bread and brown bread; and would not obey their order; for which causes, and his contempt and misbehaviour, he was committed till he found sureties for his good behaviour; and he was remanded. And so for plasterers not to intermeddle with bricklayers; and so persons of one trade not to use another; and upon *habeas corpus* upon suits in their court, *procedendos*. All which have no stronger, most of them not so strong, foundations as this act hath: nay, in 20 Jac. there was an ordinance that for Reading and Worcester clothes there should be no factors at all in those trades.

Bricklayers case cited by my brother Archer.

My brother Archer cited one Porter's case, (*ii*) 4 Jac. B. R., that an action was brought upon an act of Common Council, 4 Mar., that no citizen should set on work as a journeyman any not free of the city; and the Court bailed him.

(*ii*) In Porter *v.* Bird, 3 Keb. 262, 365.

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But the bailing him is no evidence that the law was that the ordinance was naught. I hold such an act of Common Council is good; and frequent customs have been brought, and judgments had, against freemen who have employed in their trades other than apprentices or freemen.

Now there are apparent reasons for every part of this restraint of factors by this act of Common Council: that factors ought to be admitted and approved by the Mayor and Aldermen; first, because (as I said before) they cannot otherwise prohibit foreign bought and foreign sold, which is the great privilege of the city, without which they cannot maintain their government. Secondly, The city are responsible for the goods in case of theft and miscarriage; and, therefore, it is not fit that every person should have opportunity to convey away other men's goods, which the city must answer for. Thirdly, The market is the city's, and they best know the nuisance in it. Experience hath taught us that factors have justled out the clothiers. Few of them clothiers, sell for themselves: and so the factors make the public market their private shops, which ought not to be; and it belongs to the city to take care that the markets be not huckstered and forestalled, but kept indifferent between the clothier and citizen. Fourthly, Factory in itself is no trade, and so not subject to the regulations of particular societies and companies; and, therefore, it is fit the Mayor and Aldermen should have a particular oversight to see that nothing be done by factors, by combination amongst them, to the setting the markets, either raising or debasing the price of cloths: and if they be not stinted in their numbers, (which are grown excessive) and restrained to particular persons, it is morally impossible to regulate the market.

Factory is itself no trade.

Then as to the condition of the recognizance, that the factor, be he free or foreign, shall not buy in the market, or sell out of the market, any of the cloths aforesaid, during the time he shall so continue factor; it appears to be a most reasonable condition:—first, For out of the market neither the clothier nor factor ought to sell: a foreigner cannot sell in London, but in the market; nor a freeman but in his shop, which is his market:—secondly, For the factors buying in the markets, it must be mischievous to suffer him to exercise a by-trade of his own in these commodities wherein he is the clothier's servant. Nothing is more usual than, if a man employ a servant or factor, to bind him up from trading in those commodities, wherein he is a servant. If the factor may buy for himself, it is in his power to undo the clothier. A clothier sends twelve cloths to his factor to sell: he likes them; buys them all for himself; or

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culls out the best colours and cloths, and leaves the refuse to an uncertain market. How will this be avoided? He may make the clothier pay factorage for these very cloths; and so he may underbuy any man living, none other having that privilege. He may keep the cloths unsold till the rates be low, that so he may have them at his own price. He may bring what debts and losses he will upon the clothiers. He sells out of the markets cloths on his own account: if the chapman prove bad, he may turn them upon the clothiers, and may keep the clothier ignorant of his customers. Also if the factor trade for himself, no man can buy goods, but at second hand, or after he hath made his choice, and culled the market. Many more reasons may be given for this restraint of factors; and the reasonableness of every part of the condition of this recognizance may be easily made out.

But I come now to consider, in the third place, the record of the action brought by the Chamberlain of London upon this act of Common Council. Several objections have been made upon it. First, It was observed by Serjeant Glyn, and my brother Archer, that upon this record it appears Hutchins, the defendant below, was arrested upon the first process, and that he cannot be imprisoned in an inferior court upon the first process.

I answer, first, that only makes the process erroneous, and the proceedings reversible by error; no cause to discharge the party. I answer also, that inferior courts may have a *capias*, upon the first process: if not, yet London is not to be compared with them. Here their customs are confirmed: the action is said to be brought *secundum consuetudinem;* and the pleading is here just as it was in Wagoner's case, and in all other the like cases, whereupon *procedendos* have been awarded. I have cited some of them, as Barker's case of the porters, and others. I have seen very many more, and all in the same way, pleaded as this is.

Secondly, It hath been objected that no breach of this act of Common Council is assigned; for, first, it doth not appear that he sold any broad cloths to any person for certain, but *personis ignotis*. *Resp.*, That is good enough; for it lay not in the plaintiff's conusance, who were the buyers. An indictment for stealing goods *personæ ignotæ*, or murder *personæ ignotæ*, is good.

An indictment for stealing goods of an unknown person is good: or for murder of an unknown person.

Thirdly, It is said, *vendebat ut factor:* but it is not said, he was a factor. *Resp.*, first, he is not in truth a legal factor, not being approved; and that is the crime that he did do it *as* a factor. Secondly, If it were requisite, the "*ut*" is well enough, *descendit* ut *filio et hæredi* is averment sufficient; he was *filius*

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t hæres; and it may, as the case requires, purport either identity or similitude.

Fourthly, It is said that he sold them at Blackwell Hall, and shews not in what parish it lies. *Resp.*, It need not; for his is upon a return upon a *habeas corpus*, upon which no issue can be taken, and no venue to arise; and is but to ascertain the court of the cause of detainer in prison. But in the action below, if it be not well laid, he may demur, or bring his writ of error.

So that I have done with so much of the act of Common Council as doth particularly concern the factors, and the case upon this return now before us.

I hold, first, that this ordinance or by-law made concerning factors, being grounded upon a power to make by-laws, by custom, in cases defective or of new emergencies; and confirmed by parliament particularly; and made with such qualifications as the custom requires; is good, though there were no other custom in the case.

But, secondly, That there being a custom of foreign bought and foreign sold to be forfeited, such a constitution as this is, being necessary for the preservation of that custom, is good; and sufficient in this act of Common Council appears for us to take notice of that custom.

Thirdly, That this constitution concerning factors is warranted by the custom of London concerning brokers; and that upon this return, or matter *dehors*, it appearing to the Court there is such a custom, that is also a good ground for the making of this constitution, act, or by-law. And if in any of these points the law be according to my opinion, it is against Hutchins, the defendant, below.

So that I have done with so much of the act of the Common Council as doth particularly concern the factors, and the case upon this return.

Diverse other objections have been made against the other part of the act or ordinance. But before I speak to them, I shall consider whether the illegality in any of these clauses shall make void the whole ordinance, or act of Common Council; and so extend to that which concerns the factors also; or only make void that part of it which concerns factors; for that had been a good act or ordinance of itself, and hath no dependence upon the rest.

An act of Common Council resembles an act of parliament; and in acts of parliament the several clauses are so many several acts, and may be pleaded with an "*inter alia*;" and it

An act of Common Council resembles an act of parliament, in some measure.

C. J. C. 249. 10 Co. 57. Chancellor D'Oxford's case, Hob. 226. Needler and Needham, Com. 61. Dove *v.* Manningham. Allen and Robinson's case, Rep. 51. In acts of parliament the several clauses are as so many several acts, and may be pleaded with an "*inter alia.*" An act of parliament may be in part a public, in part a private act.

An act of Common Council must be pleaded entire: but the independent clauses shall not vitiate each other.

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may be in part a public, and in part a private act. I will not say an act of Common Council may be so pleaded, because it ought to appear to the Court what it is, and whether one clause depend upon another. But when it is so pleaded, and the clauses appear to be independent, I conceive the one shall not vitiate the other. And, therefore, in this very case, I take a difference between the clauses which concern the factors, though they be several in the matter, yet they are dependent one upon another; and if one be naught, the factor is not bound by the rest. But here it is stronger; for by one and the same clause they are to be admitted and enter into a recognizance: and I think, though the breach of the act of Common Council here be laid for selling broad cloths, not being admitted as a factor by the Court of Mayor and Aldermen; yet if by law he is not bound to enter into the recognizance, and the act of Common Council be void in that part, that the act is void as to the rest also, and that he is not bound to be admitted; for the clause is drawn with one breath; and it is one entire sentence, "that none shall be allowed as a factor, unless he shall be first approved, and admitted by the said Court of Lord Mayor and Aldermen, and shall enter a recognizance," &c.

It is agreeable to common reason, and to the reason of the law, that what is bad shall not vitiate what is good. 3 Co. 83. Twine's case.

But that part of the act which concerns pitching cloths at Blackwell Hall, and the hallage, is purely distinct, and hath no relation to that part of the act which concerns the factors; and, therefore, the one part, as I conceive, shall not vitiate the other. And this construction of the act, as it is agreeable with common reason, that what is good shall not be vitiated by what is bad, so it is also agreeable with the reason of the law.

38 Eliz. C. B.; Coleshill being a customer, makes a deputation by indenture to Smyth, in which were several covenants, some good, and some against the statute of 5 E. 6.; and bond was for the performance of the covenants. It was resolved the bond was void, because it was entire; and for performance of all the covenants, whereof some were against the statute law. But now, if an action had been brought upon the indenture for breach of any of the good covenants, not dependent upon the other, the action would have lain. Upon that reason it was upon Sir Daniel Norton's case, Hob. 14. debt upon an obligation to perform an indenture of covenants touching an undersheriff's office, part of which were lawful, part unlawful; and a breach alleged in a lawful covenant: adjudged the action would lie; and if an action would lie upon the obligation, *a fortiori* upon the covenant. And upon that reason also is Byrte and Manning's case, 11 Car., and 14 H. 8. 26. In our case the acts, or constitutions which concern the

1 Cr. 426.
2 Cr. 506.

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factors, are clearly distinct in matter, and in the clauses; and depend not upon the others touching Blackwell Hall, and therefore shall not be made void by any illegality in the other.

But in the last place, *posito sed non concesso*, that this act of Common Council, being entire, if that part of it which concerns the pitching, staying, or paying for cloths at Blackwell Hall, or Leaden Hall, be void, that it shall have an influence upon that part which concerns the factors also, I shall therefore also consider the objections made against that part of the act of Common Council.

The two first clauses of this act of Common Council provide "that all cloths brought to the city shall be pitched and harboured respectively in Blackwell Hall and Leaden Hall, and not elsewhere, there to remain till they be entered, viewed, and searched respectively; and sold or permitted to be taken away, as is thereinafter directed, and hallage paid for the same."

Against this, several objections have been made; as, first, it was against law to tie them to bring the cloths to a place certain. But this is already adjudged in the case of the Chamberlain of London; and the common practice hath been always accordingly: the markets of the city (as these are markets for cloths made of wool) have been fixed at such places as the city have appointed. As there are markets for herbs, meal, corn, flesh, and the like, in their proper places, London itself for every shop for the proper commodities is a market overt all days but the Sunday. And, as appears in the prior of Dunstable's case, the market belonging to the prior it ought to be held in the market place for it ordained, and cannot be held in private places.

5 Co. 63.
8 Co. 127.
11 H, 6. 29.
(*k k*)

I have seen the act or ordinance of August, 18 Eliz., for bringing all cloths to Blackwell Hall; and therein is recited that "by an act of Common Council, 23 R. 2. it was ordained, that no manner of persons should bring or convey any manner of woollen cloths to the said city to be sold, except they were first brought, harboured, and discharged, at the common market of Blackwell Hall; therefore ordained and provided, and of old time accustomed, upon pain of forfeiture of all the said cloths so harboured and laid contrary to the said ordinance:" which shews that it was an ancient custom in 23 R. 2.; and so it appears by another ordinance, 30 H. 6., and in another act or ordinance, 18 Eliz., being that very act whereupon the case of the Chamberlain of London, 5 Co. 62. is grounded. It is said that not only of common usage, and ancient custom used within

(*k k*) Query 35 H. 6. 29.

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the city, but also by the old law and ordinances made and
cuted in the same city, it is manifest that all manner of
modities of cloths and merchandize made and wrought w
the kingdom of England and dominions of the same, br
into the same city to be sold, were and ought to be brou
such common market place as to that purpose within the
city was appointed; and there only, and not elsewhere,
to be bought and sold. And the owner thereof did ther
hallage and other duties, which was so done as well that
and lawful wares should be bought and sold, and corrup
unlawful bargains and contracts, tending in deceit of the p
and contrary to the laws of the realm, might be avoide
also that there might no foreign buying and selling be in
of the liberties, franchises, and customs of the city, being
firmed and ratified by act of parliament; so that these
ancient customs before the act of confirmation of 7 R. 2.
confirmed by that act: and this last parliament thoughi
necessary to have our common market for cloths that,
especial act concerning Worcester cloths, they have appo
them to be brought and sold only at Worcester Hall in I
well Hall.

But it hath been strongly objected, that by this ordinan
cloth is to be pitched at the hall, there to remain till it l
tered, viewed, and searched; wherein by the statutes
since the case of the Chamberlain of London (which
33 Eliz.) searchers of cloths are appointed; and those
are searched by those statutes ought not to be searched
39 Eliz. c. 20. provides overseers for cloth-making, ar
view and search for cloths and sealing of them; which
so sealed by the overseers shall not be searched, tried or v
by any other searcher or overseer of any other city or bo
by virtue of his or their said office or offices; any st
matter, or thing to the contrary thereof notwithstanding;
statute extending only to the northern counties, by 4
c. 10. it extended to all other woollen cloths. And 4 Jac
provides, "that some of the said cloths which ought to be
by the overseers shall afterwards be searched, tried, or wa
by any other person whatsoever, but only by the merch
draper, or other person to whom the same shall be sold
In the close of that act there is a clause, "that it shall
prejudicial to the aulneger, so as, after any cloth once la
searched and lawfully sealed, the same be not compelled
further viewed, searched, measured or sealed;" and 2
c. 18., "that no cloths formerly searched, viewed, mea
and sealed by the overseers where the cloths shall be
shall afterwards be viewed, searched, or weighed by any

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persons whatsoever." From whence it is inferred that this act or ordinance to bring them to Blackwell Hall to be searched (being by the statutes to be searched only where they are made) is against law.

To this I answer, that the general words of the statutes are not to be construed to take away the particular customs of London; because they are confirmed by several acts of parliament, as I have already shewed by 7 & 9 H. 4.; and Andrew de Vine's case, which was cited before.

Generalwords of statutes shall not be construed so as to take away the particular customs of London; because they are confirmed by act of parliament. 8 Co. 127. Co. Mag. Ch. 21. a.

The statutes 6 E. 3. c. 1. & 2. 25 E. 3. c. 2. 27 E. 3. c. 11. &c. provides "that every man may sell any merchandize or things vendible in any city in gross or by retail; and that every statute, charter, letters patent, usage, allowance, or judgment to the contrary, shall be void:" and yet this did not take away the particular custom of London. No more do the statutes of mortmain take away the custom of London to devise in mortmain. And though in Bagshaw's case, 1 Co. 347. some doubt was made whether the custom of London for exercising the trade of a goldsmith, not being apprentice to that trade, but to another trade, be good, notwithstanding the statute of the 5th of the Queen; and it was demurred thereupon by the Attorney-General; yet afterwards the attorney waived the demurrer, and took issue upon the custom. And before the case of Blackwell Hall, called the case of the Chamberlain of London, was adjudged, 5 Co. 62. there were several statutes in force concerning the searching of cloths, as 5 & 6 E. 6. c. 6. and 2 & 3 Ph. and M. c. 12., and 4 & 5 Ph. and M. c. 5. and some other statutes to the effect of those statutes, which have been objected; yet none of them took away the custom of London, as by that judgment in that case of the Chamberlain of London appears.

Besides, the viewing and searching in Blackwell Hall by act of Common Council is rather in pursuance, than contrary to the statutes concerning cloths; and for the better execution of those statutes without any evasion to prevent the true meaning thereof, there being nothing appointed to be paid for the view or search of the same.

And the statutes must be understood that the cloths shall not be searched again, so as that the party shall pay for the searching or sealing them: but not to take away the power of the city to make ordinances to search and view them to prevent deceits, (as in effect is agreed in that case, 5 Co. 63.) no more than for him that is to buy them. And these ordinances being subsequent to the statutes, if the statutes had taken away their former ordinances or customs to search, yet they thereby took not away that power of future making ordinances to search

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for preventing deceits and abuses, which is our case upon this act of Common Council; and which appears expressly to be allowed in the case of Blackwell Hall, 5 Co. 63. after several acts forbidding searching again.

Secondly, It was objected that it is against law to compel them to lodge their cloths twenty days at Blackwell Hall. But the act of Common Council directs that the cloths shall remain at the hall till they be sold, or having lain or continued by the space of twenty days next after bringing in of the same, shall be carried thence to some other market; and it is said that this is unreasonable, that if the owner should be arrested, or if the market be slow, and he cannot sell them, that he shall not take them away within the twenty days (I agree not with my brother Tyrrell, that the owner may by this ordinance take them away within twenty days before sale.)

To this I answer, that if the cloths were appointed not to be sold within twenty days, that so the cloths might be exposed to view so long to prevent deceits, it might have a reasonable foundation; for I find in 44 E. 3. (*l*) Symon Francis, Rot. 2. that an action was brought, and thereupon judgment was given against John Sevenoke, by William Walworth and Thomas Eaton, for buying of salt, (and so for corn or malt,) brought by water, before it remained open at Billingsgate or Queenhithe in full market by three market days, according to an ancient ordinance of the city. But, 2dly, I answer that by this ordinance, if he sells the cloths the very next day after they come in, they may be removed from Blackwell Hall. But they are to stay twenty days only in case they be not sold. By former ordinances the cloths were to remain at the hall ten days: and the enlarging the time to twenty days is for the benefit of the clothier; for if he do not sell them sooner, the hall is the cheapest, safest, and the best place to keep them in. By the custom and law of the city the goods cannot be sold, but they must be first carried unto Blackwell Hall; and then it would be much more charge to remove them, and bring them back thither to the market, than to let them stay there twenty days, for the former hallage, and try whether he can sell them, which is supposed he may if the commodity be good, and that he will take the market price.

By some former ordinances the cloths were to stay there till sold, to the intent to prevent foreign buying and selling,

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(*l*) Neither the printed Rolls, nor Cotton's Abridgments, nor the numerous manuscript copies in the British Museum, contain the year 44; and in Lansdowne Manuscript Rolls, No. 532, fol. 84, it is stated that "in anno 44 E. 3. *nullum parliamentum.*"

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by Dutch, French, and other strangers, in private places and warehouses, almost to the ruin of the city franchises; and it is for the clothier's good; it will not be thought that he brought them to the hall many scores of miles, with intent to remove them out of the market, till he had tried several markets. No wrong to him to lie there ready for sale with so good accommodation twenty days, rather than at his factors, or other private design (*m m*) to be removed into holes and corners.

And this reason seems to me, in a great measure, to answer another great objection that is made,—that the hallage is here appointed to be paid weekly, so long as the commodity remains there; and so the hallage may in time eat up the profit.—For the cloth being only to be sold there, the charge of carrying and recarrying, and the charge of housing it, and securing it elsewhere, will amount to much more than the half-hallage weekly, which, for the housing and securing a cloth, from *10lb.* to *30lb.* pays but three farthings weekly; and, if under *30* yards in length, is but a halfpenny. But, to give a further answer to it, —I say the clothier, after the twenty days, may remove them at his pleasure; so that, if he sell them not in the mean time, he is not tied to hallage any longer than he please to continue them there.

Usage of storing cloths in Blackwell Hall.

I have informed myself of former usage in this particular; and I find that there is in Blackwell Hall a public storehouse which is no part of the market place, which for about sixty years hath been used for laying in of such cloths as were brought to the market, and could not be sold; and the cloths were brought thither, and brought into the market again at the charge of the clothier. And the clothier that will make use of this accommodation, hath anciently paid a penny a month for a cloth left in the storehouse; and it is so settled by act of Common Council, 16 May, 1622; and if the clothier or the factor will lay their cloths there in the same manner at this day, they may do it, and there is no more demanded of them. But there being a charge and trouble in removing the cloths every market day, they rather desire to have the cloths continue, market day to market day, in that part of Blackwell Hall which is the market-place, that they may be there ready for the market, being there secured by the city, and always ready for sale; in which place, if they desire to continue, they pay 1*d.* or other half-hallage by the week; which, in repect of the advantage which the clothier hath by it, saving his charge of carrying and re-carrying the goods, and his security of them, is but a reasonable rate. But he is at his election still to carry them to

(*m m*) This is the exact reading of the manuscript.

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the storehouse if he will, the keeper whereof hath 20*l.* *per annum* for his fee.

The objection concerning the portage, under pardon, is mistaken: there is no increase for portage; but that is the usual fee they have for carrying from the hall into the store, and from the store into the hall again.

So for the objection that it is unreasonable that the names and additions of the buyer and seller should be registered, which was compared to the bill intended for registering in every county of England. It receives a clear answer: there is no register appointed by this ordinance, no money appointed for registering; but the hall-keeper doth it as his duty, that the buyer and seller may be known, and the deceits of foreign buying and selling, or vending false cloths, be discovered. They register, or ought to register, the sale of every horse in the market; and by statute all leather in Leadenhall is to be registered, as conceived necessary to prevent deceits.

Register of contracts.

And whereas it is objected that the hallage was but a penny for every cloth, now it is increased to three half-pence. And it is objected, that by the same reason the three half-pence may be set. And in Mr. Hampden's case of ship-money, although 20*s.* only was assessed upon him, yet, because by the same power they might assess 20*l.*, it was held unlawful. To this I answer, that hallage is in nature of a toll in fair or market; competent hallage is allowed by law, as toll, murage, portage, &c. Whether the duty assessed for hallage be reasonable or not, is to be adjudged by the Court where the business is determinable: as whether a copyhold fine be reasonable, or not reasonable. It ought to be taken here, unless the contrary appears, that it was reasonable. Nor is any thing objected to the contrary, but only that the rate is higher than formerly: for which there be many reasons given, when that comes to be debated in an action of false imprisonment, writ of error, or the like; but is not now in issue. But for so much as appears to us it may be reasonable; for 1*d.* was agreed to be reasonable in that case of the Chamberlain of London; and the increase of a halfpenny for hallage may be, because the length of these broad cloths, for which one penny and a halfpenny is now to be paid, may make the hallage proportionable to what it was before at a penny. And the statute of 4 Jac. c. 2. take notice that the cloths are larger than formerly; and, therefore provides, that if any broad woollen cloths be made longer or shorter than 24 yards, all duties and payments for the same shall be demanded and made proportionable, according to the rate and proportion of 24 yards. And I am credibly informed that the length of cloth being now considered over what it was

5 Co. 63. b. 13 H. 4. 14. Whether tolls in fairs, murage, portage, hallage, copyhold fines, &c. be reasonable must be adjudged by the Court where the business is determinable.

formerly, that the hallage is less by the now act than what the old act for hallage appoints to be paid for a whole cloth. Besides, I observe further, that the act of Common Council, 18 Eliz. whereupon the case of the Chamberlain of London, 5 Co. 63. was grounded, and the question grew, whether *1d.* hallage was reasonable, did appoint several rates of hallage, not only for one penny, but some for one penny halfpenny, some two pence, according to the bulk or value of the cloth; and the question might as well have grown upon that for which two pence was assessed, as that for which one penny is assessed. And there appears a necessity for the alteration of the hallage, not only in respect of the several mixtures of the wares for which it is to be paid; but also by reason of the new devising, from time to time, of new sorts of draperies. But, admit hallage is increased, all things are dearer now, and the prices of cloths much higher than formerly; and the charge of offices, the price of housing, and other things incident, is increased; a new Blackwell Hall lately built, the other not being large enough, which cost 1,000*l.*, besides the necessity of more officers to keep it; the price of money itself raised; so that one penny halfpenny is no more than what anciently was one penny:—and the city secures the value of the goods whilst they are in Blackwell Hall; and it may, therefore, since the values of the goods housed and secured are also increased, be reasonable to increase the hallage in a moderate and competent proportion; and so we find it hath been from time to time.

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And, lastly, though this duty for hallage, (or housage, for so it is), be in consideration of the great charge the city are put into for the housing of that cloth, the officers' charges who attend the service, and other like charges; and that the repairing the hall hath lately cost 600*l.*; yet the benefit of this hallage goes not to any private advantage, but towards the maintenance of the poor in Christ's Church Hospital.

So that, upon the whole, I conclude,—that the hallage and impositions by this ordinance go to public and charitable uses; and that this act of Common Council contains nothing in it *de novo*, but recapitulates and puts together the several laws formerly used in the City concerning draperies and factors, time out of mind; and that there is not any clause in it but what is agreeable to the ancient customs and ordinances;—that this ordinance, or act of Common Council, hath the same foundation as most of the ordinances of the city; and by which their government is supported;—that, if ever, it is now necessary to support the government of the city, the want of encouragement whereof causeth most of the rich merchants and traders here to decline the freedom of the city, or to bear public

The rich merchants and traders of London begin to decline the freedom of the city, or to bear public offices.

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offices:—that there are a multitude of buildings lately erected near the city, almost equal to the city itself; and we already see the great difference between the government of the city and the adjacent places, frequent murders, robberies, and great disorders in the one, which are rarely in the other, and is to be attributed only to the exercise of their government;—that the city and their freemen have as much right to these franchises as any man hath to his inheritance; and it is part of *Magna Charta, quod civitas Lond. habeat omnes libertates suas antiquas, et consuetudines suas*, which hath been confirmed by successive parliaments; nothing appears to me disagreeable to law, or disconsonant to common reason or good faith; and —that therefore a *procedendo* ought to be awarded.

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Tr. 14 Car. 2. C. B. Rot. 2558.

(It is lawful to sue out an original against a member of the House of Commons, although parliament is sitting. From the death of Charles the First to the restoration of Charles the Second, the law did not die: but was only suspended in its operation by the impediment of the usurpation. And as the *law* did not *require* a plaintiff to sue in the Courts set up during that time, nor look upon them as Courts, and as the act of 12 Car. 2. concerning judicial proceedings is not to be extended to confirm the Courts themselves, only the acts done in them, the not suing in those Courts was a merit, not a laches. Nevertheless, where the cause of action accrued on the 10th of July, 21st of Charles the First, an action of *the case*, brought upon a writ sued forth on the 27th day of May, in the 14th of Charles the Second, is barred by the statute of limitations of 21 Jac. 1. c. 30. although the defendant was a member of the House of Commons from the said 10th of July, until the 30th of January, 24 Charles the First, and although no legal Courts sat afterwards until the restoration. The reason is, that the lapse of time is a bar in the body of the said act of limitations; and the proviso of exceptions reacheth only to cases of infants, *non compos mentis*, femes coverts, the imprisoned or beyond the seas, and not to persons impeded by the obstruction of justice, or otherwise.)

Harg. MS. No. 55. fol. 157—56. fol. 59.

BRIDGMAN, C. J.

Sir George Benyon brought an action upon the case upon an *indebitatus assumpsit* for 15*l.* 8*s.* 6*d.* for mer-

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(*a*) S. C. cited in Carthew 157; and by Holt, C. J. in 1 Salk. 502. as Bynion's case; and by Holt, C. J. in 1 Salk. 512, as in "14 Car. 2. C. B. Binion *v.* Eveling, deciding that filing an original against a parliament man was no breach of privilege." The case is much noticed

chandizes against Sir George Evelyn, of Wiltshire, supposed to be made 1st of April, 1657.

The defendant pleads *non assumpsit infra sex annos proximos ante diem impetrationis brevis originalis.*

The plaintiff replies, that at the time of the promise, and from thence till the 30th of January, 2 Car. 1. the defendant was a member of the House of Commons in the parliament of the said king, began November 3, 1640, 16 Car., and thence continued to the said 30th of January, 24 Car. which day it was dissolved by the death of the said king: and that by the privilege of parliament every person, being a member thereof, immunis est et immunis esse debeat ab omnibus arrestationibus, actionibus, sectis, et prosecutionibus quibuscumque nisi pro proditione, feloniâ, et fractione pacis domini regis; ita quod non liceat alicui, non existenti membro ejusdem parliamenti, aliquod breve originale aut billam versus aliquem personam, existentem membrum parliamenti, ex aliquâ curiâ domini regis de recordo durante continuatione ejusdem parliamenti, pro aliquâ causâ qua-

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rdett *v.* Abbot, 14 East. 18., few copies of it were printed 1, by Mr. Hargrave, of which preserved in the library of itish Museum, title, Bridgin the catalogue of printed there. In the manuscript argrave has inserted the folreferences:—" Salk. 420; Rogers, 1 Lev. 110. King *v.* Ld. Raymond 1213; 4 Prynne Brev. 804; 12 & 13 W. 3. c. 3. Ann. c. 18. 11 G. 2. c. 24. 3. c. 50., by which changes been made in the law of pri; and Lord Shaftesbury's case *eas corpus*, B. R. Tr. 1677, . 2." and most of his notes to dgment are stated in their places in this Volume. In Hargrave's preface to Lord jurisdiction of the Lords' , p. cxxxix. the case is noticed. Prynne's Brief Survey of Partary Writs, 814, referred to . Hargrave, it is stated that case of Sir George Benion t Sir John Eveling was adjudged in the Court of Common Pleas, Hil. 15 & 16 Car. 2., by all the Judges thereof upon demurrer." " It was resolved upon solemn argument by all the Judges, (especially the Lord Chief Justice, Sir Orlando Bridgman, arguing it very largely and learnedly,) That the privilege of parliament did not take away the liberty of the subject to commence and prosecute actions of trespass, debt, account, covenant, and the like, against members of parliament, or their menial servants, even in parliament time, as was evident by the Commons' own petitions, and the King's, Lords' and Judges' resolutions in the cases of Lark, Thorp, Clark, Hyde, Atwell, Walsh, Cosyn, Ferrers and Trewynnard; which the Chief Justice vouched and insisted on, in his learned argument of this case, to the great satisfaction of those of the long robe, and most auditors then present, as well members of the Commons House, as others." Mr. Prynne states the other cases fully.

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cumque, impetrare aut prosequi. And he further says, that neither the said 30th of January, 24 Car., nor at any time after until the 29th of May, 12 Car. sec., fuit aliqua curia cancell. dom. regis Angliæ extra quam aliquod breve originale per ipsum Georgium impetrari poterit versus eundem Johannem; nec fuit aliquod dom. regis magnum sigillum Angliæ cum quo aliqua talia brevia originalia sigillari potuerunt, nec aliqua alia curia domini regis de recordo in quâ prædictus Georgius actionem suam prædictam, versus eundem Johannem per breve vel per billam prosequi potuisset, ad aliquod tempus a prædicto 30 die Januarii, anno supradicto usque prædictum 29 diem Maii, anno 12 supradicto, libera et aperta fuit; nec fuit aliquod placitum in aliquâ curiâ domini regis, durante tempore prædicto, placitatum aut prosecutum. And further says, that within six years after the said 29th of May, anno 12 supradicto, *vix.* 27 die Maii, anno regni domini regis nunc 14, he sued forth and prosecuted his original against the defendant; et hoc paratus est verificare; unde petit judicium et damna, &c.

The defendant rejoins, that King Charles the First died 30th of January, 24 Car., post cujus mortem regimen hujus regni descendebat dicto domino regi nunc, ut filio et hæredi of the said late King; and that the cause of action (if any did arise to the plaintiff) did arise and accrue to him, 10 Julii, 21 Car. 1. et non postea; and that a tempore actionis prædictæ accretæ, et durante vitâ dicti nuper regis, nec non a tempore mortis prædicti nuper regis huc usque, tam curia cancellariæ quam curia de superiore banco, curia de communi banco, et curia scaccarii temporibus congruis fuerunt apertæ et tentæ apud Westm. prædict. ita quod the plaintiff might have freely prosecuted his action with effect against him: and further says, that by an act in parliament, 25 Apr. 12 Car. 2., it was enacted, that no writs, processes, plaints, pleas, &c. had commenced or prosecuted before the 5th of May, 1660, in the name, style, title, or teste custodis libertatum Angliæ, &c. or of Oliver, protector, &c. should be put without day, or abated, quashed, or discontinued, by the King's most just reassumption of the actual exercise of his kingly government; nor should the same be cause of error, abatement, or discontinuance: but all such writs, processes, &c. should

stand and be continued, and shall and may be proceeded upon, prosecuted, and returned, notwithstanding the same were commenced or prosecuted in English; and notwithstanding the happy change and restitution of his majesty's name and style in judicial proceedings, *prout* by the said act *(inter alia)* it appears; *et hoc paratus est verificare, unde ut prius.*

The plaintiff surrejoins, that at the time of the action accrued, and from thenceforth to the 30th of January, 24 Car., the defendant was a member of the House of Commons of the said parliament; *ita quod* the said plaintiff aliquod breve originale aut aliquam billam versus prædictum Johannem ex aliquâ curiâ dicti nuper regis de recordo pro causâ prædictâ, durante continuatione ejusdem parliamenti, impetrare et prosequi non potuit; et ulterius that from the said 30th Januarii, 24 Car., (quo die parliamentum prædictum dissolutum fuit) until the said 29th day of May, 12 Car. 2. non fuit, nec fuere aliquæ curiæ dicti domini regis de recordo, nec curia domini regis de cancell., nec curia ad placita coronæ coram ipso rege tenend. nec curia domini regis de communi banco nec curia domini regis scaccarii sui nec aliquæ aliæ curiæ dicti domini regis de recordo apud Westm. vel alibi infra regnum Angliæ in quâ vel in quibus prædictus Georgius actionem suam prædictam versus eundem Johannem per breve vel billam prosequi cum effectu potuisset liberè et apertè. Et hoc paratus est verificare unde ut prius petit judicium et damna sua occasione præmissorum sibi adjudicari. The defendant demurs generally, and the plaintiff joins in demurrer.

Upon this record it appears that it is an action of the case upon an *indebitatus assumpsit* in 15*l.*, 1st Sept. 1657, *pro mercimoniis prius vendit. et deliberat.*

The defendant pleads *non assumpsit infra sex annos proximos ante diem impetrationis brevis originalis.*

The plaintiff excuseth him by his replication for not bringing the action within six years. First, That at the time of the promise, and from thence till the 30th of January, 24 Car. 1. when the parliament dissolved by the King's death, the defendant was a member of parliament; and that by privilege of parliament every member of parliament ought to be free from all arrests, actions, suits, and prosecutions, unless for treason, felony, or breach of the peace, so that it is not lawful for any not being a member of parliament to sue out any original against him.

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... the said 30th day of January, 24 Car., ... the 29th of May, 12 Car. 2. there ..., *domini regis Angliæ*, out of which ... sued out. Neither *fuit aliquod domini* ... *in quo talia brevia sigillari potuerint.* ... *domini regis de recordo* in which he could ... bill against the defendant, until the said ... Car. 2., was open; and that he sued out his ... years after the 29th of May, 12 Car. 2., *viz.* ... 14 Car. *de et super promissione et assumptione* ... of the Court of Chancery of the King.

... replication, and the subsequent pleadings, there ... things to be considered,—the matter set forth, whether ... plaintiff from being barred by the statute of limita- ... and then the manner and form of pleading both of the ... and defendant's part.

For the matter it affords us three points:—

I. The first ariseth from the replication, and is this;—There being a cause of action of *assumpsit* against a member of parliament, whether an original may be sued out against him, and kept up by continuances whilst he remains a member of parliament, without breach of the privileges of parliament. For this is the excuse of the plaintiff for the time from the action accrued in July, 21 Car. till the death of the King, why he sued not out his original against the defendant; for it was not lawful, saith he, during that time to take out an original, or to prosecute any action against him.

II. The second point ariseth partly upon the replication, and principally upon the rejoinder and surrejoinder, and is this;—the plaintiff for his excuse, why he sued not the defendant from January 30, 1648, when the late King died, till after the 29th of May, 12 Car. 2., sets forth, that in that space there was no Court of Chancery of the King out of which an original might be sued, nor any great seal of the King whereby to seal such writs, nor any Court of the King's, of the King's Bench, Common Pleas or Exchequer, or other Courts of the King's of record, in which he could prosecute with effect. And the defendant (not denying there was no great seal of the King) sets forth there was a Court of Chancery, of Upper Bench, of Common Pleas, and Exchequer, open at Westminster, *congruis temporibus* during all that space. So that the plaintiff might have freely brought his action; and sets forth the breach of the act of the continuance of process, 12 Car., (*b*) whereby the process of these Courts in that time are made good: but

(*b*) 12 Cha. 2. ch. 3. F. H.

affirms not that they were the King's Courts, nor denies not what the plaintiff said, that there was no Court of Chancery of the King, or other Court of the King, open in that time. So that now it judicially appears as well by the pleading itself, as by the act of parliament set forth in the record, that during all this space there were Courts kept by usurpers under another style or teste, and no Court of the King kept. So that now the point is, whether the plaintiff, not suing out his originals, or prosecuting the defendant during the time of usurpation of the government, when a Court of Chancery was open, and justice between party and party was administered under usurpers; but no court of the King was then open; whether this shall be turned to a lachess to the plaintiff, that the time of limitation shall incur during this time of usurpation.

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III. And the third point ariseth upon concession of the two former points, *viz.* that the plaintiff ought not to sue during the time the defendant was a member of the parliament, nor was bound to sue in any court under usurpers. Whether yet there are such impediments as by the law or equity of the act of limitations (*c*), the plaintiff shall have six years from the time of those impediments removed, to bring his action.

If any one of these be against the plaintiff, he is barred, according to the philosopher's rule, *Bonum ex causâ integrâ, malum ex aliquâ parte.*

I. As to the first point,—Whether Sir John Evelyn, the defendant, being a member of the Commons House of Parliament, at the time of the debt contracted, and the *assumpsit* in law created, can be sued by original, and that original continued during the sitting of parliament, without breach of privilege of parliament,—I should have been glad not to have had an occasion to have delivered my opinion in this point, for two reasons:—

First, because it is a tender thing for an inferior court to judge of the privilege of a superior court: and my Lord Coke, Jurisdiction of Courts, fol. 50. saith, "The Judges are assistant to the Lords, to inform them of the common law;" but it doth not belong to them (*d*) to judge of any law, custom, or

It doth not belong to the Judges to judge of any law, custom, or privilege of parliament, where the questions *arise* within the parliament.

(*c*) 21 Jam. 1. ch. 16. F. H.

(*d*) "But Lord Coke adds a qualification, which is here omitted, between the words "it doth not belong to them," and the words "to judge of any law, or custom, or privilege of parliament," he interposes in a parenthesis *(as hath been said)*. So it is in the *first* edition of Lord Coke's Fourth Institute, which was in 1644. and so it is in the fourth edition; and, as I at least presume, in the other editions. Therefore Lord Bridgman, in citing against

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privilege of parliament; and cites for it particularly Thorp's case, 31 H. 6. Rot. Parl. No. 26., and some other cases; which case only extends where the privilege of parliament comes in debate in the House of Peers. The Judges are not to determine there what the privilege of parliament is in such case; for the conusance thereof belongs to the Lords of the Parliament, and not the Judges; and yet even there the Judges deliver their opinion to the Lords as assistants, what the course of common law was in such cases. According to which opinions the Lords gave their judgment against privilege in that case: *That Thorpe being condemned in trespass in the interval of parliament, and in the Fleet, pro fine Regis, should remain in execution for the party.* But out of parliament, where, upon an action at common law, a question concerning the privilege of parliament arises, nothing hath been more frequent than for the Judges of the common law to deliver their opinions concerning it, and consequently to give their judgments.

Vide tamen, 4 June 1621. Journal de Parl. *contra*. *Mon livre del* Lord's house, that privilege of parl. continued during an adjournment.

Where a question upon the privileges of parliament arises upon an action at common law out of parliament, nothing hath been more frequent than for the Judges to deliver their opinions concerning it.

The King himself daily permits his privileges and prerogatives to be determined between him and his subjects in the Courts at Westminster, by the common law. And when in a common action the privilege of parliament doth come to be part of the plea or justification, it is of necessity that the privilege, whether there be such, and what the extent of it is, come also into consideration. For, as it is said in the Register, of the Ecclesiastical court, which is inferior to the common law, if a common law point come in question there, *Non est consonum*

The prerogatives of the Crown are daily determined between the King and his subjects in the Courts at Westminster by the common law. Register, 51.

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himself, rather overstates Lord Coke's language. As the words are given by Lord Bridgman, they import *its being Lord Coke's own opinion.* But as Lord Coke's own words are in this part, they amount to a *veto* against such an inference," " F. H."

See the debates and protest on the right of the House of Lords to take notice of the proceedings of the House of Commons, in matters of election. Parl. Hist. vol. XVI. p. 814.

The Committee of the House of Commons, upon the proceedings relative to Sir Francis Burdett, in 1810, seem to select their precedents with reference to this distinction between noticing matters in debate in parliament, and matters of parliament which arise in other courts incidentally. " Your Committee think it proper to state, that Sir Francis Pemberton, and Sir Thomas Jones, in defending themselves at the bar of this house, for their conduct in over-ruling the plea to their jurisdiction, in the action of Jay *v.* Topham defended the judgment they had given, by resting upon the nature of the pleading, and not by denying the jurisdiction or authority of this House; and Sir Francis Pemberton expressly admitted, that for any thing *transacted in this House*, no other court had any jurisdiction to hear and determine it." Cobbet's Parl. Debates, Vol. XVII. Appendix, p. 87.

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rationi quod cognitio accessarii in causâ Christianitatis impediat ubi cognitio causæ principalis ad forum ecclesiasticum noscitur pertinere. So I may say here, matter of contract, and whether the writ was brought within the time prescribed by the Statute of Limitations, which is the principal, being determinable here, the privilege of parliament, coming in incidentally as part of the case, as a consequent, must, in this particular case, be also debated here. And so it was in Trewyniard's case, 36 H. 8., Dyer 60. in an action of debt against a sheriff, upon an escape of a member of parliament taken in execution, and delivered by privilege of parliament; and in Rivers's case, 12 E. 4.; and in other cases, some of which I shall have occasion to cite anon at large.

The next cause why I should have avoided the present debate about privilege of parliament, is this:—it was said at the bar, that it had been declared by the Committee of the House of Commons of privileges, the last sessions, in a case of a member of parliament;—That it was a breach of privilege to sue out and file an original against a member of parliament,—which is the point in question (*e*). I have inquired of some parliament men of great note and learning, touching that resolution, who have denied to me that they know of any such. So that it is to me as *res integra*. But if it be so as was alleged, I shall give all reverence, as becomes me, to all opinions and votes, as proceeding from so honourable a body. But I am under the conscience of an oath, to do equal law according to the best of my own judgment, whatsoever the authority of other opinions or resolutions may be.

39 E. 3. 14. the Judges of Assise proceeded according to law, notwithstanding such a resolution and command to surcease.

And 13 E. 3. Voucher 119., in a *formedon* against a baron and feme, the wife, being received, vouched her husband, and for cause shewed that her husband levied a fine *sur conusance come ceo* to Thomas Cranthorn, who rendered to her and her husband, and his heirs. The demandant counterpleaded the voucher, that Thomas had nothing of the gift of the husband. The tenant by receipt said, this averment was not reasonable against the fine; and if the Court shall award that she ought to answer over, she was ready. The demandant sued to the council in parliament; and by advice from thence it was held that the averment was reasonable. And this plea of the tenant

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(*e*) "Note that the resolution of the Commons on Sir Edward Coke's motion in June 1621, concerning their privileges, treats serving any process upon a member, or suing him in any court, a breach of privilege." Note by Mr. Hargrave in the manuscript.

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was a refusal of the averment. And thereupon a writ of *procedendo* issued out of Chancery, reciting the advice of the council in parliament, commanding them to go on to judgment. But the Judges differing in opinion, the cause was again brought into parliament, and judgment commanded for the demandant against the opinion of Stoner, and a writ of error brought. Thus far appears in Fitzherbert, Voucher, whereby it appears that, notwithstanding those two resolutions of parliament, the matter was again brought in judgment before the Judges.

14 E. 3. Rot. Parl. 31. (g)

This case is at large in the Parliament Roll, wherein Sir Geoffry Staunton (*f*) was demandant against Sir John Staunton, and Amy his wife. And it appears by the Roll of Parliament, that upon petition by the demandant in parliament, 13 E. 3., that justice be not delayed, (for the Judges differed in opinion, Sir John Stoner the Chief Justice, being of an opinion, that the averment could not be received against the fine,) it was endorsed by the council, that by the law of the land the averment was receivable, and judgment peremptory to be given. But there being difference of opinion in the Common Bench, there was a second petition in parliament; and, thereupon, by command, in full parliament, the clerk of parliament was sent to the Judges of the Common Pleas, either to give judgment; or, in case they could not agree, to come into the parliament, and bring the records with them. And thereupon it was accorded in parliament, that Sir Geoffry Staunton, the demandant, being a stranger to the fine, was receivable to the averment; and that he ought to have judgment. And thereupon it was commanded the Judges that they in the Common Pleas give judgment accordingly; which Shard did, *Stoner refusing*. Afterwards, as appears by the case in Fitzherbert, notwithstanding the resolve in parliament, error was

It is called in the record *avise de parlement.*

(*f*) "The same case is mentioned in Hale on the Jurisdiction of the Lords or Parliament 117, and in Hale's MS. discourse or history concerning the power of judicature in the King's Council and in parliament, Chap. IV. and page 38 to 49." F. H.

(*g*) In a copy of this Roll in the Harleian Collection, No. 715, fol. 163, it is "Roll. 30." In the Cotton Collection, Titus E. 1. fol. 51, the Roll is also numbered 30. The Cotton copy is headed, "A special cause for law and power of parliament. The case is very long: but the abridgment here containeth the whole matter in law." A copy in the Lansdowne Collection is similar to that in the Harleian library. To the notice of the case in Hale's Jurisdiction of the Lords House of parliament Mr. Hargrave has added this note:—"I do not perceive that the printed Rolls of parliament include the subsequent proceedings in parliament on this case of Sir Geoffry Staunton. But see Cotton's Abr. of Parl. Rec. 130."

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brought; and it gives no further in the print. But in the manuscript in the library at Oxford, 15 E. 3. fol. 1. s. 2., the proceedings appear upon that writ of error.

It was urged by Pole, of the defendants' counsel, that judgment was given by the assent of parliament, and ought not to be reversed. *Sed non allocatur;* for that judgment was not rendered in parliament: Then it was urged that judgment, according to the new statute, was assented unto in parliament. That was a statute made the same parliament, 14 E. 3. c. 5. s. 2., whereby, in cases of delay or difficulty, a prelate, two earls, and two barons, were empowered to hear such cases, and give judgment; and in case of great difficulty to be brought by them into parliament. And it was said, it was commanded the Judges to give that judgment; and, if they had not done it, it had been error apparent. Stanford the Judge said, judgment was not given but in the Common Bench. And that which was there done may be here redressed; *et ceo fuit avis en councel* (that is, the parliament,) *en absence de party ne poit pas charger;* and so went on in examination of the error.

Votes in either house of parliament, singly, in the absence of the parties concerned, are not so binding but that the Judges must decide according to what they conceive the law to be, although their opinions be contrary to those votes.

The use I make of it is this:—That resolutions or resolves in either house of parliament, *singly*, in the absence of the parties concerned, are not so concludent in courts of law, but we may, (with due respect nevertheless had to those resolves and resolutions,) nay, we *must* give our judgment according as we, upon oath, conceive the law to be, though our opinions fall out to be contrary to those resolutions or votes of either house.

And, therefore, that I may *liberare animam meam*,—as to the first point, I am of opinion that to file an original against a member of parliament, *sedente parliamento*, is lawful, and not against the privilege of parliament; and, consequently, that the plaintiff here, having neglected to sue out his original within the six years accrued in the lifetime of the late King is barred by the statute of limitations.

To clear this matter of privilege so far as it concerns the case in question, we must distinguish *between* (*i*) privileges of parliament *ab intra*, which concern the parliament, or either house of parliament *in concreto*, or the members of parliament within their houses, such as are provided for by the indemnity of the Lords and Commons, 9 H. 4. No. 12, and the statute of

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(*h*) Search has been made for the editor without success in the Bodleian library at Oxford for this manuscript: but a copy of the Parliament Roll of 14 E. 3. was found there, containing the case in the same words as the copies before referred to.

(*i*) "It is *from* in the manuscript; but the sense requires *between*." F. H.

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4 H. 8. c. 8. liberty of speech, not reporting, (*k*) nor questioning (*k*) out of the parliament what is said in parliament, and the like; which are, as it were, of the essence of the parliament, and not dispensable withal, and of which every man concerned ought at his peril to take notice; and personal privileges belonging to the respective members as single persons, and exercisable without doors, for themselves, or their menial servants, such as are to be free from arrests, and from having trials against them for their freeholds, and others of like nature; for as for these (so far as their absence (*l*) from parliament is not thereby required,) the members themselves may dispense withal; and, as I shall shew by and by, they were not heretofore allowed them as privileges necessarily belonging to them, without a writ or supersedeas of privileges of this latter writ is our question.

Liberty of speech, not reporting, nor questioning out of parliament what is said in parliament, are of the essence of the parliament.

Privilege of parliament, as not to be obstructed in the personal performance of parliamentary duty, distinguished from privilege, without the walls of parliament, of the respective members personally, or for their servants, where parliamentary duty is not impeded. 36 H. 8. 60. Dyer. C. J. 15.

Every privilege is by prescription. The ancient usage of parliament, and the law of parliament, are the same thing. The bringing of an action is but a demand of our right in a legal way. C. C. 285. Argument from the absence of precedents.

Now every privilege is by prescription, as it is said, 36 H. 8. 60. Dyer. And the ancient usage of parliament, and the law of the parliament, is the same thing. I shall, therefore, consider what the usage hath been as to the matter of the privilege of parliament as to suits against a member of parliament, sitting the parliament; which is our present business; *first*, as to the founding or commencing of an action against him; or, *secondly*, as to the prosecution of an action against him, whether brought before, or sitting the parliament, by arresting of his person; or, *thirdly*, in respect of other proceedings against him upon actions during the sitting of parliament.

To the first, *the bringing of an action*, which the Mirror saith, *nest auter chose que loyal demand de son droit*, I cannot find, by any search that I could make, any one record, or judicial precedent that made it out to be against the privilege of parliament to demand a man's right by original action, where it went not so far as to reach their persons or estates; though there are infinite precedents of supersedeas of privilege for members of parliament, and their servants. And, therefore, I must use Littleton's argument, fol. 23. upon the statute of Merton. If any such could have been, it shall be intended it would have been sometime put in use. But if the law allow proceedings upon such actions against members, *sedente par-*

1 Co. 88.

(*k*) See Appendix K.

(*l*) See the case of Mr. Galway Mills, Parl. Deb. Vol. IX. pp. 733, 744., &c. where p. 747, the qualification to this dispensing power, in respect of the *absence* of the *arrested* member, seems not to have been regarded.

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liamento, a fortiori, it allows the suing out an original. And, therefore, as touching the arrest of their bodies and other proceedings upon action, I shall take it into consideration what the privileges are, so far as tends to the proving what I have said, that it is no breach of privilege of parliament to sue out an original against a member of parliament; for, in shewing the extent of the privilege of parliament in these cases, the right of commencing an action by original will incidentally and consequently fall in to be shewn.

It is clear that a member of the House of Commons ought not to be arrested at the suit of the party upon mesne process whilst parliament is sitting.

First, then, as touching *arrests*, it is clear a member of parliament (I still mean in all this debate a member of the House of Commons,) *sedente parliamento*, ought to be free from arrests at the suit of the party upon mesne process; (for as to arrests after a condemnation or judgment, I shall take it into distinct consideration; and as to arrests in case of treason or felony, or for the peace, or at the suit of the King, it is not our present business;) I say as to arrests, the Speaker always desires, the first day when he is presented to the King, and the King grants to the Commons, *(inter alia)* freedom from arrests. And the reason is well given in Trewynard's case; (*m*) they are supposed to be according to their writs of election *de gravioribus et discretioribus viris, &c.* the wisest men in the kingdom; and, therefore, their personal presence to *treat de arduis regni negotiis* is necessary: and, therefore, it follows, that the person of every such member ought to be privileged from arrests at the suit of any private person, during the time that he is embusied about the affairs of the King and his realm. These are the words of the book; (*n*) and it is clear law. We allow the like privilege to any that come to the inferior Courts of Westminster, *eundo, morando, et redeundo; a fortiore* in a supereminent manner it is due to the superior Courts. But as to the applying and making use of this privilege: by the ancient course, (*o*) the person who would be free from arrests was to have his writ of privilege, or *non molestando*, out of the Chancery under the great seal; for thither was his election returned of record: or, if he were actually arrested, he was thence to have his writ of supersedeas; whereupon he was discharged. And if the privilege were doubted, whether it would lie, sometimes a *habeas corpus cum causâ*. 36 H. 8. 6.

(*m*) Dyer 59. b.

(*n*) Dy. 60. a. F. H.

(*o*) "Ancient course. 1. Writ of privilege, or *non molestando* out of Chancery. See form of one, 4 Prynne Prerog. of Parl. 183. 2. Or if arrested, writ of *supersedeas* to discharge. See form of one in 4 Prynne Prerog. of Parl. 755, 777, 783. and Rastal's Entries 1295. 3. If privilege denied, an *habeas corpus cum causâ*. See 4 Prynne Brev. Parl. 769. Scobell 40. See F. N. B. 247. C., and 1 Hatsell 160. 1st ed. F. H.

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D'Ewe's journal 482—518. F. H.

And that such writs should issue before he could be discharged, stands with great reason of law; for, when he is arrested by virtue of the King's writ, it was thought reasonable he should be discharged by the King's writ also, which is of as high a nature, and not by bare suggestion. Besides the ground itself of the privilege or supersedeas may be questioned by the plaintiff in the Court where the action was brought, as—whether he was indeed a person so to be privileged? for that is traversable;—whether the privilege extended to that case? of which the Court was to judge: and, therefore, it was proper that there should be a writ in such case, as a matter of record, to which the party might plead; and not to discharge him, being a prisoner of record, upon a bare affirmation. And further, in such case of supersedeas of privilege, when the party was discharged by it, the arrest was not wholly void, nor was the sheriff who made the arrest anciently punished for it; for he was commanded by the King's writ to take him, and was sworn to obey the King's writ. And this is agreeable to the reason of law in other cases. A nobleman hath a native privilege to be free from arrests in debt or trespass; yet if a *capias* issue in such case, an officer, though he know him to be a nobleman, may execute such a writ without offence, 6 Co. 54., Isabel, Countess of Rutland's case. For the sheriff and his ministers are sworn to serve the King's

If a *capias* issue against a nobleman, an officer may execute the writ, though he know him to be a nobleman. The sheriff and his officers are sworn to serve the King's writ, and ought not to examine (*p*) the judicial act of the Court.

(*p*) The distinctions which arise upon the application of this doctrine may be found in the case of Brown *v.* Compton, 8 T. R. 424., where the Court of King's Bench confirmed the ancient principle that the order of even the highest Court is not necessarily to be obeyed; and it is submitted that the expression, that the "sheriff or his officer ought not to *examine* writs," must be understood in a qualified sense. The responsibility of the immediate actor under civil commands is one of the safeguards by which the subject is protected against illegal acts. More recent cases are noticed in Prestige *v.* Woodman, 6 Barnewall and Alderson 12; and see Wynne *v.* Boughey in this Volume.

That the same principle governs those who are under military law, even more rigorously than those under merely civil authority, see State Trials, Vol. V. p. 1163. 8vo. ed. the case of Colonel Axtell, before Sir Orlando Bridgman, when Lord Chief Baron; the case of Captain C. in Ventris 250; Debates in the House of Lords 1673; Mr. Locke's letter from a person of quality, Locke's works, Vol. X. p. 225.; the mutiny act, and the articles of war; 4 Burr. 2419, 2472; Sutton *v.* Johnstone, 1 T. R. 495; and 4 Taunt. 69.

Charles the Second, and James the Second, indeed, attempted to introduce a different principle, and for a time succeeded; see the act of Uniformity, 13 & 14 Car. 2. c. 4. s. 9.; and the Memoirs of James the Second, by Mr. Clarke.

But it was one of the merits of the Revolution to restore the ancient law. The statute of 1 W. and M. sess. 1. c. 8. s. 11. repeals the passive obedience clause of the act of Uniformity.

and ought not to examine the judicial act of Court, but to execute the writ; and agreeable is 36 H. 8., 61 Dyer; . 76; Com. Mansel's case, (*q*) 12 & 14 H. 8. 16. And the party so arrested was set free by virtue of his pri-, yet he was not set free absolutely, but *making his at-* (*r*) to answer the action; which shews the foundation ringing of the action) was still good, though the super-ure (their proceedings by arrest) was void. In Thomas Thorpe's case e's case, 31 H. 6. Rot. Parl. No. 26, 27, the Chief e, in the name of all the Judges, declares to the the course of proceedings in the Courts of Westminster supersedeas of privilege, that if a member of parliament ested in such cases as be not for felony, treason, or se-of the peace, or for a condemnation had before a parlia-it is said that all such persons should be released of all arrests, and *make an attorney*, (*r*) so that they may have edom and liberty freely to attend the parliament. This regnant a proof of the course and practice of those times, the declaration of all the Judges, that I shall not need ke any further proof before that time of the usage. Since he course was accordingly, as appears by M. 4 E. 4. Rot. . B., Brandon, a burgess of parliament, arrested upon a , discharged upon a *supersedeas*;—and Hil. T. 12 E. 4. . et 10. in Rivers's case (*s*) in the Exchequer, which I shall ccasion to cite at large;—and 17 E.4. Rot. Parl. No. 35. se of John Atwell, burgess for Exeter,—by which it ap-the law took care to preserve their persons from arrests, t to hinder other proceedings upon contracts; from whence

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It is printed at the end of n's Commentaries." F. H. Ir. Hatsell seems to think e proceedings stated on the s of parliament, that the *in-* of suits against members cessfully resisted. Hatsell's nts, Vol. I. c. 3. p. 173. And mittee of the House of Com-in the case of Sir Francis , seem to have been of the inion. First report on that rl. Debates, Vol. XVII. Ap-p. 88.

ee note (*y*) in this case; and lebates in the House of Com-nne 8, 1810, on the moving whoever should presume to ice or prosecute any action, nt, or prosecution, against any person for acts done in obedience to the orders of this House, such person and persons, and all attornies, solicitors, counsellors, and serjeants at law, soliciting, prosecuting, or pleading in any such case, are guilty of a high breach of the privilege of this House." This resolution was negatived. Parl. Debates, Vol. XVII. p. 513.

(*s*) "See post. 69. a. (*of the manuscript*, p. 344 of this volume,) and 4 Prynne Brev. Parl. 757, which was not published till about two years after the judgment of C. B. in this case of Benyon and Evelyn. In 4 Prynne Brev. Parl. 753, there is also the privilege case of Donne *v.* Walsh, in 12 E. 4." Note by Mr. Hargrave in the manuscript.

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I necessarily infer that if such proceedings in suits may be against a member of parliament; *a fortiore*, an original may be sued out, and continuances entered, *sedente parliamento*.

But in case of a judgment against a privileged person, and he taken in execution thereupon, *sedente parliamento*, the law seems in former times to have been more doubtful,—8 H. 6. Rot. Pl. No. 57.; Larke, a servant of William Mildred, a member of parliament, was taken in execution during the parliament, upon a judgment before the parliament in *Communi Banco*, in trespass. Upon the petition of the Commons the King, by the advice of the Lords, but with the consent of the plaintiff's counsel, enacts that the judgment shall stand in force; and that, after the parliament ended, the Judges shall make out process of *capias ad satisfaciendum* and *pro fine*, as if he had never been imprisoned, and commissioners to be appointed by the Lord Chancellor to take him and deliver him to the warden of the Fleet. But where it was further prayed that none of the members *a vos parlement desore a venire lour servants ou familiers ne soient ascunement arrestes, ne en prison deteynes durant le temp de ces parlement, sil ne soit pour treason, felony, ou surety de peace*, the answer was *roy se avisera*. There was a special act of parliament for a new examination, and by a new way, against Larke: (*v*) but the King refused to make a general law in it.

Larke's case.

Elsynge, 171. The Earl of Arundel's case, a strange exposition of this act. (*t*)

In Thorpe's case, as I have cited it before, the Judges seem to be of opinion, that if a man be taken in execution, *sedente parliamento*, for a condemnation before the parliament, he shall not be discharged. The principal case there was of a judgment in trespass, and the party in execution *pro fine regis*, in the interval and during the adjournment of parliament; and being in execution for the King, he is also for the party without any prayer, as 5 Co. 88., Clarnon's case, and so needed not that resolution; and in the Year Book, 2 E. 4. 8. the case was, that one who ought to have his liberty in the Common Bench in the term time, was in the vacation time condemned in London; and in the term time taken in execution and discharged of the execution, but not of the condemnation. And being moved in the Court, it was thereby agreed that he ought not to have been discharged. Danby, the Chief Justice, said, that he himself saw, *quant un tiel vient icy pur ceo quil fuit un del parlement, et fuit arrest: et mise en execution sur un condemn-*

(*t*) "What Lord Bridgman here adverts to is in p. 217. of the edition of Elsynge, in 1768." F. H.

(*v*) Upon this case Mr. Hatsell remarks, "It seems difficult to ascertain precisely what the meaning of the King's negative is.—Perhaps it meant nothing more than that, the particular case being provided for, the King would consent to no general law on the subject." Vol. I. p. 20.

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ation long temps devant le parlement, et voit avoir estre dismisse del execution, et le mesme notify a councel le roy et a nous, &c. et il puissoit. Choke: vraiment c'est voyre.

But that opinion, as I conceive, that a member of parliament taken in execution could not be discharged, was not grounded upon the point of non privilege in such cases; for since it is clear that a person against whom a judgment is given, is not disabled to be a member of parliament; so it follows, he ought to have the privilege of immunity for arrests in respect of the necessity of his personal attendance, this immunity from arrests being a thing granted at the opening of every parliament.

The reason of the opinion, that an arrest of a member of parliament in execution could not be avoided, is the maxim, that if execution be once done, the party can never be taken again in execution, if he be discharged of execution.

But the reason of that opinion, that an arrest of a member of parliament in execution could not be avoided, is that it was held a maxim in law, if execution be once done, if the party be discharged of execution, he can never be taken again in execution. So it appears by Larke's case before cited; and so in that case of Thorpe,—the plaintiff, the Duke of York's counsel said, he was without remedy if the defendant were discharged. And, therefore, since it was his lachess that he did not sue out his supersedeas of privilege before he was arrested (in which case the arrest, perhaps, would be void); the justice of the nation thought it fit rather to favour the execution which is the life of the law, (and it is also of general concernment) than the party, who through his own lachess, brought the arrest upon himself. For, by the way, the law was not then taken, that every man at his peril must take notice of the person to be a member of parliament, as appears 5 H. 4. Rot. Parl. No. 47., and by several other acts of parliament made on the behalf of several members. And, agreeable to the opinion of those judges in Thorp's case, that the law was so that the party could not be taken again in execution after the parliament was done, appears in the noted case of Ferrers, cited out of Hollingshead by Crompton, in his Jurisdiction of Courts (*w*); wherein it was expressly agreed that the party had lost his debt, and no new execution could be taken out against Ferrers.

Hide's case.

William Hide's case, 14 C. 4. Rot. Parl., No. 55. William Hide, burgess of Chippenham, was taken in execution for debt; and because by discharging him the debt would be lost, there is a special act to give the Chancellor power to issue out writs to bring his body into the Chancery by *habeas corpus*, and there to discharge him; and also to indemnify the Lord Chancellor, and Sheriffs, and to save the right of the party, that they might take out new execution after the parliament ended. But as to the point of privilege, Ferrer's case determined the law for the privilege against the execution. The case was this: (*w*)

(*w*) See Appendix, (L.) for this case from Hollingshead.

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vide ceo a large Crompton Jurisdiction Courts, fol. 8. 36 H. 8. fol. 61. and 275 Dier.

This case doth not only determine the law for the privilege against the execution: but also that the party ought to be discharged without writ when the serjeant at arms came for him. But Pasch. 6 Eliz. in Moor's Reports (and I have seen the same in other good reports), Dyer said that Ferrers ought not to have the privilege of parliament, and that it was allowed *minus juste*. And indeed in Trewyniard's case, it appears that the very same parliament, 35 H. 8., after that resolution in Ferrer's case, Trewyniard being a burgess of parliament, and taken in execution, was freed, not by the mace or serjeant at arms, but by a writ of *supersedeas* of privilege; which writ was a security to the sheriff against an escape, whether the privilege was allowable or not. And I observe upon Ferrer's case, that the sheriffs were not sent to the Tower for arresting Ferrers, but for the contempt in not delivering him, when the serjeant at arms came.

Moor. 57. a. 86. 36 H. 8. 61. (*x*)

Sheriff committed to the Tower for a contempt of the House of Commons, for not delivering a member, a prisoner, in execution, when the serjeant at arms was sent to demand him.

But the law is now settled in both these points, that there may be a new execution, and that he may be discharged without writ, by the statute 1 Jac. c. 13., which enacts that a new execution may be taken forth after the time of the privilege expired; and that no officer shall be chargeable by any action for delivering out of execution any such person "by such privilege of parliament set at liberty;" the words are not "set at liberty by writ of privilege," but "by privilege of parliament." It goes farther, "that this act shall not extend to the diminishing of any punishment to be hereafter by censure in parliament inflicted upon any person which hereafter shall make, or procure to be made, any such arrest." So that this statute reserves to the parliament a power of punishing the person who shall arrest a member: but leaves it not to inferior courts, which remain still to follow the same rules they did before. And therefore still the discharge upon arrests of privileged persons in the ordinary courts of justice ought to be by writs, as I conceive. In the Journal of the House of Commons, of 18 Eliz. in the case of one Maltby, a servant of a member of parliament, it was reported for a committee, by the then attorney of the Duchy, that they found no precedent for setting at large by the mace any servant of a member of parliament, but by writ. But against that report, it was resolved in the House of Commons, that the mace was warrant sufficient for it. I desire to be understood that I speak not any thing to impeach in the least the judgments of parliament in case of their privileges

Maltby's case.

Each House of Parliament is the only judge of privilege, when a question comes before it.

(*x*) "Dyer 60. a. is meant." F. H.

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Privilege ought not to be allowed, without writ or plea upon the bare affirmation of a party concerned, or his servant, or a note under the hand of the clerk of the crown. (*y*)

are the only judges, when the question comes before them
ıeir houses: but to shew only what rules we ought to
w out of their walls, and in inferior courts; and the way
hich the privileges ought to be allowed by us in these
ts; and not as hath been of late done, since the beginning
ıe long parliament, without writ or plea, upon a bare
nation of the party concerned, or his servants, or a note
r the hand of the clerk of the crown. (*y*)

"The point as to the neces-
f a writ of privilege to dis-
a member of parliament from
or debt was solemnly argued
chaelmas and Easter Terms,
2., in the case of John Pitt,
e, member for Camelford.
sult was his being discharged
Court of King's Bench, on
ı supported by affidavit. But
ıs not done till after petition-
ord Chancellor Talbot for a
f privilege, and taking the
n of the twelve Judges; of
ten against two held that the
ge might be on motion. The
reported in Com. 444. Fort.
2 Stra. 985. 2 Barn. 412.
rd Annally's Rep. B. R. temp.
ick 28 to 41. The report in
book is the fullest; and, ac-
to what is there stated, Lord
ck, then C. J., treated the
s a very serious one. There
other point, which was as to
t's being within the time of
e; and eleven Judges, being
ent, held, that he should be
ged in a proper and legal
. After stating this, Lord
ck, according to this report
l Annally, proceeded thus:
he remaining question is,—
that proper and legal me-
whether by writ of privilege
he great seal, upon record;
her it may be done by mo-
pon affidavit? As to this
he Judges were all of opi-
at a writ of privilege is a
method to be taken for the
discharge of the defendant's person. But there was a great doubt, and some variety of opinion amongst them, whether the Court would discharge him in the method now taken, upon motion, or not, no case having been produced from the books wherein any person entitled to privilege of parliament was discharged after this manner. But it being a matter of consequence, and the short time between the arguments and the last day of the term being taken up in necessary business, the Court was of opinion to enlarge the rule till next term, without prejudice to the defendant's bringing his writ of privilege in the mean time; and if the defendant does not think fit to bring his writ of privilege in the mean time, but insists on the method already taken, they will then give their opinion upon the matter, after having given it the consideration it will require, it being altogether a new proceeding.' It is proper to add, that after having taken the opinion of the twelve Judges, Lord Hardwick, in a very learned speech, which is given by Lord Annally in considerable fulness in his Reports, explained the chief points on which the ten Judges, who thought Mr. Pitt dischargeable on motion, founded themselves; and that *all* the Judges appear to have held a writ of privilege to have been the regular method previously to the statute of 12 W. 3. c. 3., which, in regulating proceedings against members of parliament, prohibits arresting them

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The use which I make of all this part of the debate is this: that if anciently there was so much doubt, whether an arrest upon process of execution could be avoided by privilege of parliament; and if it might, yet whether without a writ of *supersedeas?* it is not to be doubted but that *the suing out of an original* was then held lawful without question; which tended not to the disturbance of his person, or to hinder his personal attendance; but to attach an action, and to preserve a right from being destroyed.

Usage as to proceedings on actions against a parliament man, other than by arrests.

I now come to consider, in the next place, what the usage hath been as to the proceedings upon actions against a parliament man, other than by arrests. Anciently, where it concerned their freehold or inheritance, there went out a general writ *supersedeas,* directed to the Justices of Assize, reciting that the King had sent summons of parliament, (as you may see claus. 8 E. 2. Mem. 22. *dorso.*), commanding the Judges, *ne per eorum absentiam* who were summoned to be personally present, *exhæreditationem aliquam sustineant, quod captionibus assisarum juratarum et certificationum, aliquem prelatorum, comitum, baronum, et aliorum fidelium nostrorum quem vobis constiterit de mandato nostro prædicto ad dictum parliamentum venire, tangentium supersedeant, durante parliamento prædicto.* And the like, 8 E. 2. Mem. 33. dorso: *quod ad aliquas assisas, illos qui ad parliamentum venire vel eorum aliquem, tangentes, eodem parliamento durante, minime procedatis.* Upon which writs the parties might have had particular writs of *supersedeas,* that it might *constare,* as the first writ mentions, that they were summoned to the parliament, (which, by the way, implies the Judges were not bound to take notice of it). But I observe two things on this writ: first, that it hinders not the *bringing* the writs of assize, but the proceedings to the taking the assize, *durante parliamento.* Secondly, that it reached only to such cases where the freehold was concerned, and was *ad exhæreditationem,* and did not forbid the taking of Juries in other cases; for though the words be *assisarum juratarum et certificationum,* yet *juratarum* is not there to be taken for any juries whatsoever, that there was a prohibition to take them: but *juratarum* there hath reference to the assize, as the word *certificationum* hath. So the patent, or commission for assises, is: *constituimus vos justiciarios nostros ad omnes assisas jurat. et certificationes coram quibuscumque justi. tam per diversa brevia, &c.; et ideo vobis mandamus, quod ad certos dies et locos, quo vos*

Placita in Parl. fol. 551. in App. C. J. 24.

C. J. 153.

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during the time of privilege; and that they even seem to have held the writ essential. See the case of Holiday *v.* Pitt, in B. R. 7 Geo. 2. Annal. Rep. temp. Hardwick, 28 to 41." F.H. See note (*v*) in this case.

(*z*) "Ryley's Placita Parliamentaria." F. H.

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C. J. 158. *margine* 19 E. 2. Assise 408 (*a a*), where a special plea, as there a release is pleaded to assise, a change of the parties *et ils ouster de dissesin.*

ad hoc provideritis, assisas juratas et certificationes illas capiatis, &c. And there is a writ to the sheriffs to bring before the Judge of Assize *omnia brevia assisarum juratarum et certificationes.* But the juries that we take in the country are by virtue of the writ of *nisi prius*, so that *juratarum* in that writ is taken for the Jury, when the *recognitores* (who by writ are to be there the first day) are returned *in juratam.* And in the writ of *certificat.* upon an assise sued, the jurors are to be summoned *ad certificand. justic. super quibusdam articulis contingent.* the former assize; so that the precedents do not at all warrant the stopping of any trial in any personal action. But since an *eject. firmæ* is a mixed action, as well as an assize, and possession is thereby recovered, and it tends *ad exhæreditationem*, and the *eject. firmæ* is in lieu of the assize, it stands with justice the privilege should extend to it, so it be granted by writ, or appear by plea, and not by claim, by parol, or by certificate, by letter, without the great seal;—a course taken up since the beginning of the long parliament; no precedents or acts whereof shall have any weight with me, but such wherein the King and two Houses concurred.

But now, for proceedings upon actions against a member of parliament, *durante parliamento.*

I have already mentioned some precedents that in debt, trespass, or other contracts, if the person privileged be arrested upon mesne process, during the parliament, that upon his discharge *he shall make his attorney*, that the plea may go on; whence the consequence is strong, that *a fortiore* he may be sued by original of debt; for that, being but a summons, hath less of compulsion in it than any subsequent process. I shall, therefore, conclude this with two more precedents, which, I conceive, if well considered, are full authorities, both for the lawfulness of commencing actions against persons privileged, and proceeding against them to judgment; so that their persons be not restrained *durante parliamento.*

(*a a*) "Fitz. Ab. tit. Assize, pl. 408. Assise *versus* Joh. R. le dit J. dit que il entre par W. and que le pl. avec rele' a luy par fuit, &c. et sur ceo fait l'assise fuit charge et trove pour le pl'. Bone. ascun tiend' que home doit enquer' en ceo cas oust: le diss. par l'assise pour ceo que ceo soleit estre le ley mas il n'est nemy issint ore, et ceux del banke de Westm. ne voyle enquer ouster de diss. et si nous fesomus auterment que ceux font ceo ne serra bien seant. mes ascun gentz quident que en tiel cas quant l'assise est change en nature denquest par mys des parties, que les auters que sont nosme en le tre. sont sans jour, &c. et puis avisement de ceo il eux don. jour a Westm. a quil jour Bone, agard que il rec. seisin, &c. el jamais enquer oustre del desseissin, &c. F.H.

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The *first* is in Thorpe's case, which I cited before (*bb*) to another purpose. The Chief Justice, in the names of all the Judges, declared the course of proceedings in the Courts of Westminster upon writs of *supersedeas* of privilege, "That there be many and divers *supersedeas* of privileges of parliament brought into the Courts. But there is no general *supersedeas* brought to surcease all process (*cc*). But if there should be, it should seem that this high court of parliament, that ministereth all justice, should let the process of the common law. And so it should put off the party complainant without remedy, forasmuch as actions of common law be not determined in this high court of parliament." These be the very words of the Judges, whereby they resolve that a general *supersedeas* to cease all process during the parliament, is against law; and the reason, there given, that if it should be so, the parliament, instead of administering justice, by letting the process of the law, would leave the party complainant to be without remedy, holds much more in our case, of not permitting him to sue out an original. For, first, as well in personal as real actions, in many cases he is bound up by the Statute of Limitations to a definite time. Secondly, if the privileged person be an heir, if the party cannot commence his action, *durante parliamento*, in the mean time the heir aliens, and he is quite without remedy; and other like instances might be cited.

A general *supersedeas* in cases of privileges to cease all process during the sitting of parliament, is against law.

Rivers's case in the Exchequer, 12 E. 4.

The next precedent, with which I shall conclude, is Hil. 12 E. 4. in Scacc. Rot. 7. & 10. the judgment of the Barons of the Exchequer: but it is with the advice of all the other Judges of England, that there was such a custom, that members of parliament, *durante parliamento*, in debt, trespass, accompt, covenant, or other contract, *non debent imprisonari*, ought not to be subject to be imprisoned; but that there is no such custom, that *non debent implacitari*. And thereupon judgment given against the privilege. The record is not long; and because it confirms something else which I have already opened, I shall read it (*dd*):—

London, Scil.

Johannes Rivers, civis et pelliarius Lond., venit coram

(*bb*) P. 337.

(*cc*) "*Ante*, and Rot. Parl. 31 H. 6. n. 26. there cited." F. H.

(*dd*) "This record was printed by Prynne in his 4 Brev. Parl. 757. which was published about two years after Lord Bridgman's judgment in this case of Benyon *v.* Evelyn." Note by Mr. Hargrave in the manuscript.

The case is stated in Prynne at greater length than in the text. He says, p. 762. *ib.* that he transcribed it with his own hand out of the Plea Rolls in the Exchequer.

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baronibus, &c. et queritur per billam versus Robertum Cosin, custod. magnæ Garderob. dom. Regis, nunc alias dict. &c. (*e e*), *præsens hic in curia eodem die super comperto suo, de officio suo prædicto, hic ad hoc scaccarium reddend. per Thomam Harrison, attorn. suum de eo quod ipse Robertus ei debet, et injuste detinet* 41*l.* 10*s.* 6*d. sterling, et pro eo injuste, &c.*

Def. habet lib. loq. usque 15 *Pasch. &c.; et habet ulterius lib. loq. in crast. Tr. &c.; et ulterius lib. loq. inde in Octab. Mich.; et ulterius lib. loq. usque diem Merc. anno regni dicti Regis tertio decimo.*

Et super hoc idem Robertus per attorn. suum præd. detulit hic breve domini Regis sub magno sigillo suo clausum, Thesaurariis et Baronibus hujus scaccarii direct., cujus quidem brevis tenor sequitur in hæc verba :—

Edwardus, Dei gratiâ, &c. Thesaurariis et Baronibus suis de Scaccario salutem; cum secundum consuetudinem regni nostri Angliæ hactenus obtentam et approbatam, domini magnates, et milites com., cives et burgenses civitat. et burgorum ad parliamenta nostra de summonitione nostrâ venientes, et in eisdem morantes seu residentes, ac eorum servientes et famulares, ratione alicujus transg. debiti computi, conventionis, seu alterius contractus cujuscunque dum sic in parliamentis nostris morantur, arrestari minime debeunt, imprisonari, seu implacitari (*ff*), *et jam ex gravi querelâ dilecti et fidelis nostri Thomas St. Leger, unius militum com. nostri Surr., accepimus; quod licet ipse ad præsens parliament. nostrum de summonitione nostrâ venerit, et in eodem moretur, quidam tamen Johannes Ryver, civis et pelliarius London, considerationem ad hoc non habens, implacitat coram vobis in scaccario prædicto, per billam sive breve inter Robertum Cosyn custodem magnæ Garderob. nost. aliis dictum Robertum Cosyn civem et mercat. London, servientem prædict. Thomæ, qui cum eodem Thomâ in præsens parliamentum venit, et serviens famularis ejusdem Thomæ existet (prout idem Thomas coram nobis in cancell. nostrâ personaliter const. sacramentum præstitit corporale), de debito* 41*l.* 10*s.* 6*d. quod idem Johannes præfato Roberto exigit, ut dicit in ipsius Thomæ St. Leger damnum*

(*e*) "Instead of the &c. the full words, as in 4 Pry. Parl. Writs, 757. —Robertum Cosyn, *civem et mercatorem Londini.*" F. H.

(*ff*) Prynne notes on this word, that "this was a new pretended privilege." 4 Pry. Parl. Writ. 758.

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non modicum, et gravamen, et contra consuetudinem supradictam; vobis mandamus, quod si ita est, tunc placito illi coram vobis ulterius tenend. supersedeatis, omnino ipsum Robertum contra consuetudinem prædictam non molestantes in aliquo, seu gravantes. Teste meipso apud Westm. tertio die Nov. anno regni nostri tertio decimo.

Et præd. Robert Cosyn, jam defend., dicit quod ipse et præd. Robertus Cosyn in dicto brevi nomine nat. sunt una et eadem persona, et non alia neque diversa; et quod ipse est et à dicto tertio die Nov. et tempore postea fuit serviens famularis prædicti Thomæ St. Leger, et cum eo ad dictum parliamentum venit. Quæ omnia et singula idem Robertus Cosyn paratus est verificare, prout cur., &c.; unde non intendit quod ipse ad respondendum præf. Johannem River ad actionem suam prædictum compelli debeat, et petit judicium, et breve prædictum sibi allocari, &c.

(gg) *Et super hoc præd. Rob. River, per Ricardum Blisset, attornatum suum, petit quod ipse Robertus Cosyn respondit ei in præmissis, brevi illo non obstante, et quod breve, pro eo quod non habetur, nec unquam habebatur talis consuetudo, quod magnates, et milites comitat. ac cives ac burgenses civitat. et burgorum, ad parliamentum de summonitione regia venientes, ac eorum famulares, ratione alicujus transgr. computi, conventionis, aut alterius contractus cujuscunque dum sic in parliamentis regiis morentur, minime debeant* IMPLACITARI, *prout in brevi illo specificatur, et recitatur, disallocetur.*

Et super hoc viso, et supra lecto brevi prædicto, per barones, &c. habitoque avisamento justic. domini Regis de utroque Banco in hac parte, quia videtur præfat. baronibus de avisamento justic. præd., quod talis habetur et habebatur consuetudo quod magnates, et milites com., et cives et burgenses civitat. et burgorum, ad parliament. de summon. regia veniendi, ac eorum famulares, ratione alicujus transgr. debiti, computi, conventionis, contract. cujuscunque, dum sic in parliamentis Regis morentur, CAPI AUT ARRESTARI *non debeant,* SED NULLAM HUJUSMODI CONSUETUDINEM FORE QUIN IMPLACITARI DEBEANT, *prout in brevi illo supponitur.* IDEO CONSIDERATUM EST *per barones prædictos, quod breve illud disallocetur.*

(gg) "*Ib.* Rot. 7. *vide* Hil. 12. E. 4. Rot. 4, 3, 10, 11, 20." Prynne's note.

Et quod prædictus Robertus Cosyn respondeat prædicto Johanni River ad billam suam prædictam, brevi prædicto non obstante, et super hoc ad eundem diem Mercurii, 15 *Nov. dictus Robertus Cosyn nil dicitur, &c.*

Et postea judicium redditur pro querente, quod recuperet debitum suum prædictum et damna sua ad 26*s.* 8*d. &c.*

Which precedent, being by the advice of all the Judges of England, ought to have its due respect; and contains several things worthy of observation; and amongst others, that there is no such custom or privilege, that a member of parliament cannot be *impleaded* during the parliament; and the person who claimed the privilege was put to answer during the parliament, and judgment given against him.

The resolution of all the judges I cannot say was satisfactory to all the Members of the Commons House, who claimed greater privileges, both as to the discharge of members or their servants taken in execution, than was allowed either to the King, or Lord in Parliament, or in Westminster Hall by the Judges, as appears by the wording in the close of Mr. Hide's case, 14 E. 4. No. 55.; as (*h h*) also by their claim in John Atwell's case, burgher of Exeter, 17 E. 4. Rot. Parl. No. 35. both (*i i*) being after this resolution of the Judges in Rivers's case. The Commons, *in the latter case*, (*k k*) by their petition set forth, that time out of mind the knights, citizens, and burgesses of parliament, amongst other liberties and franchises, have had and used privilege that any of them should not be impleaded in any action personal, nor be attached by their person or goods, in their coming to any such parliament, there abiding, nor from thence to their proper home resorting; which liberties and franchises the King, at the commencement of this parliament, graciously had ratified; and sets forth that John Taylor, since the commencement of this parliament, by virtue of eight feigned informations in the Exchequer, had condemned the said John Atwell, citizen for Exeter, in 160*l.* the said John Atwell daily attending the parliament, and not having notice of the condition, and that several writs of execution, some of *fieri facias*, some of *capias ad satisfaciendum*, had

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(*h h*) "It is *or* in the manuscript." F. H.

(*i i*) "See as to these two cases of Hyde and Atwell, 1 Hatsell, 1st ed. 44 to 51." F. H.

(*k k*) "The words *in the latter case* are added by the editor; because what follows is Atwell's case only." F. H.

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issued to several sheriffs, so that he cannot have his free departing from this present parliament to his own home, for doubt that both his body, his horses, and other goods necessary to be had with him, should be put in execution, contrary to the privilege due to the members of parliament. Upon this petition the King, by the advice of the Lords, ordained, that the said writs of execution should not be executory, or hurtful to him; and that the Chief Baron should have power (the judgment being in the Exchequer) by virtue of that ordinance, to grant writs of *supersedeas* to surcease all manner of executions in that behalf to be made. And this was thus far agreeable to the resolutions of the Judges in Rivers's case, and Thorpe's case, that *no execution* ought to have issued during the Parliament. But instead of allowing the privilege, or franchise, as it was demanded, that he ought not to be *impleaded* as aforesaid, &c. during the parliament, there is an express provision and saving, in these words :—" Saving always to the aforesaid John Taylor, his foresaid judgments and executions, and every of them, to be had and served at his pleasure, against the said John Atwell, at every time after the end of this present parliament, this present ordinance notwithstanding." Whereby it appears, the judgment of the King and Lords in parliament agreed with the Judge's resolutions, that the IMPLEADING a member of parliament, during the parliament, without taking out execution, was not against the privilege; for there is a saving of the judgment. From all which the inference is strong, that the act of parliament did allow the foundation, and precedent, and judgment executed against Atwell, a member of parliament, during the parliament, though it discharged the execution.

C. Jur. 24. C. J. 48. case *de subpœna.*

It hath been objected out of Coke's Jurisdiction of Courts, that a citation out of the ecclesiastical courts, or a subpœna out of Chancery, cannot be served upon a member of parliament, yet neither of them did arrest or restrain his body; and my Lord Coke there cites for it Bogo de Clare's case, 18 E. 1. and John de Thoresby's case, 10 E. 3. Be the law what it will be in those cases, which it is not my purpose to determine, yet the resemblance to our case comes not home. The citation was out of the ecclesiastical court which was *then* accounted *forum alienum*, and not the King's Court. And the *subpœna* issued out of an English Court, and the original of it, and the manner of the proceedings by *subpœna*, grew up since the privilege of parliament settled. Neither doth my Lord Coke say, that a bill *shall not be put into Chancery*, or *a subpœna* TAKEN OUT, which is enough to make a suit depending (and comes nearer to our case of suing out an original,) but that a

The proceeding by subpœna grew up since the privilege of parliament was settled. 5 Co. 47. Gilbert Littleton's case.

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subpœna against a member of parliament shall not be SERVED: But the truth is, my Lord Coke's Treatise of the Jurisdiction of Parliament is a posthumous work. And though I shall attribute as much to his learning in the law, as to any of the sages in the law whatsoever; yet, there not being that freedom in former times of having copies of the records at large as hath been since, when he comes to cite them, he is guided by abstracts, which occasions miserable mistakes; and by the "*modus tenendi parliamentum*," which as to the time of making it was most certainly a counterfeit piece; so that there are a multitude of errors in his chapter concerning parliaments. And in particular both these records are grossly mistaken. (*mm*)

In the time of Sir Edward Coke, and before him, there was not the freedom of access to records which there has been since. (*ll*)

First, in Bogo de Clare's case:—It was this,—He and the Prior of St. Trinity were attached to answer to the King's steward, to the King's marshal, Edmund, Earl of Cornwall, and the Abbot of Westminster, for that the Earl came to the parliament by the King's command, and passing to the council through Westminster Hall, *ubi quilibet de regno libere, licite, et pacifice venire debet*, to prosecute his own business, without admitting there any citation or summons, the Prior, at the procuring of Bogo de Clare, cited him to appear before the archbishop at a certain day, to answer such things as should be objected against him, in the contempt of the King, to the prejudice of the liberty of the Abbot of Westminster, and prejudice of the offices of steward, and marshal, whereas it belongs to their offices only, and not to any others, to make summons and attachments *infra palatium domini regis*. Thereupon they were committed to the tower; and Bogo paid a fine to the King 2000 marks, and to the Earl 1000 marks. Upon

Bogo de Clare's case. Prynne's 4 Inst. (*nn*)

(*ll*) "Year Books, books written of the law of England, and judgments in parliament, are three of the authorities, and they are *thesauri aperti*. Judicial records and precedents are the fourth, and they are *thesauri* ABSCONDITI." 10 Co. 75. case of the Marshalsea. "This was the oversight of that great ornament of our law, Sir Edward Coke, who by trusting to other men's abridgments, and notes of records, (which himself had no *vacancy* to examine) was often seduced by them, and hath thereby seduced others, by their mistakes and misrecitals published in his printed books; of which I have here and elsewhere given the readers some particular instances, to rectify both his and their mistakes, without the least intention to detract any thing from his venerable and due worth and memory."—Prynne's Preface to his edition of Cotton's Abridgment.

(*mm*) See 1 Hatsell 6.

(*nn*) "This reference to Prynne on 4 Inst. must have been considerably subsequent to the judgment in this case of Benyon and Evelyn; for Prynne's book on the 4 Inst. was not published till some years after." Note by Mr. Hargrave in the manuscript; the reference is in the handwriting of Umfreville.

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which record it appears the ground of the punishmentwas not a citation *tempore parliamenti*, but because it was a citation in the King's palace where *quilibet de regno*, every man ought to be free. 2ndly, The spiritual court *at that time* was looked upon as not depending upon the King, but upon the Pope; and it was *not curia regis*. And, therefore, it was an affront at any time to cite any person there. 3rdly, If there were cause of summons or attachment for a civil plea, it ought to have been by the King's officers. And this privilege of being exempt from serving of process there was not only in respect of the King's palace, and in respect of the place of his residence, but also to other inferior courts. (*oo*)

Jurisd. of Courts 24.

John de Thoresby's case.

As for John de Thoresby's case, 10 E. 3., the record itself is at large, C. J. 24, where it appears that Henry de Harrowden and others were convicted and imprisoned for citing John de Thoresby into the ecclesiastical courts, he being then in the Court of Chancery in the presence of the archbishop, then Chancellor. This John de Thoresby, my Lord Coke saith in his marginal note, was then clerk of the parliament; and the writ is, *quod in curiis nostris in quibus negotia regni nostri deducant, ubique adeo liberæ sunt et exemptæ quod nec aliqua forum ecclesiasticum concernentia in eisdem curiis nostris fieri, seu exequi, nec aliqui easdem curias nostras ad aliqua forum ecclesiasticum contingentia facienda vel exequenda ingredi debeant;* which is meant of the ordinary Courts at Westminster, and particularly of the Chancery, and does not at all concern the parliament, but those records *curiæ nostræ*. Against the record itself, in the margin, my Lord Coke, or the publisher, says, *in the Court in Parliament*, though the record itself tells you the fact was in the *Chancery;* and in 19 Jac. my Lord Coke cited a record, 10 E. 3., "that a subpœna was served on the clerk of the House of Commons; and the party was committed for breaking the privilege of the House: and in Brereton's case (*pp*), 19 Jac., upon this precedent there cited (which is entered in the journal book,) one who had served a subpœna on a member of parliament was committed for breach of privilege." The precedent meant was certainly this of John de Thoresby; and hath these four gross mistakes. He was not clerk of the House of Commons, but of the parliament.

Scobell of Parl. 91. 89.

(*oo*) Mr. Hatsell's conjectural remarks on this case are supported by this authority of the Chief Justice against the conclusion drawn from it by Sir Edward Coke. 1 Hatsell's Precedents, p. 6.

(*pp*) The case is noticed shortly in the printed Journals, Vol. I. pp. 268. 267. 269. 655.: but the Editor has not found the entry of Thoresby's case, either there, or in "the Journal Book" itself.

2dly, The offence was for serving a citation, and not a subpœna. 3rdly, It had no relation to the parliament, but for serving it in Chancery. 4thly, The party who served it was not committed for it, but *after conviction by jury, and judgment after indictment.*

Scobell 89. Coke's case.

In the journals in the House of Commons, 26 Eliz., as they are cited by Scobell, Richard Coke, a member of parliament, was served with a subpœna; and thereupon it was ordered, that the Recorder of London and other members, attended by the Serjeant, should repair to the Court of Chancery, and there signify to the Lord Chancellor and Master of the Rolls, that by the ancient liberties of the House the members of the same are privileged from being served with subpœnas, and to require not only the discharge of Mr. Coke's appearance, but from thenceforth to grant privileges for other members upon request of the House signified under their Speaker's hand; which the recorder and the rest did accordingly, but returned this answer that the Lord Chancellor told them he knew no such privilege touching subpœnas, and would not allow it unless the House did prove it had been allowed also in the Court of Chancery; and precedents were directed to be viewed, but shortly after the parliament ended.

What the law is in this case of subpœna (as I said before) it is not before me to determine; I only mention it in reference to the mistake, and misapplying of precedents. Neither my Lord Coke, nor any other writer that I know of, saith that an original cannot be sued forth. I have shewed many precedents of proceedings, *durante parliamento*, upon actions. I have found none to prove that it is against the privilege of parliament to sue out an original; and, therefore, I shall conclude that Sir George Benyon might have sued out his original in the lifetime of King Charles the First.

But it may be objected that the original in this action is a *pone per vadios et salvos plegios*; upon which the sheriff may attach the defendant's goods, which will be forfeit for non-appearance; and it is said, C. J. 24, that a member of parliament shall have privilege for his horses, and other goods distrainable.

This objection, so far as it concerns the gist of the action, is easily answerable; for the plaintiff might have brought his original of debt, which is but a summons, and so have continued his action. But then the process in debt being summons, attachment, distress, and upon a *nihil*, *a capias*, the objection will still remain; for if you cannot continue the ori-

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ginal *sans* breach of privilege, it is to no purpose to sue out an original; *lex non precipit inutilia.*

First, I conceive there is not authority to warrant the privilege so generally, and as my Lord Coke puts it, that the goods of a member of parliament are not in any case distrainable, *tempore parliamenti.* The case which he cites to be *inter petitiones coram domino rege ad parliamentum post festum Mich.* anno 18 E. 1., I find none such. (*q q*) But I find the case cited by Mr. Elsing, that *Magister Militum Templi petit quod distingat catalla episcopi sancti David, tempore parliamenti pro redditu unius domus in London. Rex respondit, non videtur honestum quod illi de concilio suo distringantur tempore parliamenti, sed alio tempore per ostria et fenestras, prout moris est.* (*q q*) The record I cannot find, (*q q*) though I have searched for it. The latter part of it, *quod distringat per ostria et fenestras,* is not law at this day: but for the case, I conceive it good law. The bishop was called by writ, and as one of the King's Council was at the parliament in London, and the goods which the bishop had in London were to furnish his house whilst he attended by command. And I think it now a breach of privilege to distrain the horse, or other goods of a member of parliament, which he hath with him for his use, whilst he attends by command. But this hinders me not but that I may distrain for a rent, or other duty in the country; to get my right, upon which, if it be unjust, a replevin lies; or to distrain his horse damage fesant, if he come into my ground. Besides, there is a great deal of difference between a distress of the

"See Elsynge in p. 174. of the 3d edit. and p. 184, of the edition of 1768." F. H.

It is a breach of privilege to distrain a horse, or goods of a member of parliament, which he hath with him for his use, whilst he attends by command. (*r r*)

But the privilege of parliament extends not to prevent a distress for rent or other duty in the country. (*s s*)

(*q q*) "Prynne also in 1664, when he published Part IV. of his Brev. Parl. had not been able to find the record of the case of the Master of the Temple in 18 E. 1. cited by Lord Coke. See Part IV. Prynne Brev. Parl. 812, and 1188. But in his animadversions on 4 Inst., which did not come out till 1669, he admits having at length found the record; and in p. 18 of his latter book he gives it at length from the Roll of Petitions of Parliament, 18 E. 1. found in the treasury of the King's receipts in the Exchequer. The search appears to have caused much trouble to Mr. Prynne; and this he angrily imputes to the defective and erroneous manner in which both Lord Coke and Elsynge had referred to the record. The petition is now published in the Rolls of Parliament, Vol. I. p. 61; and what is there agrees with Prynne, 4 Inst. and substantially with what Lord Bridgman here states in his argument to have found in Elsynge. Possibly Lord Bridgman had a manuscript copy of Elsynge more full than the copies from which the printed editions were taken: for not even in the edition of 1768, which is the last, and seems the best, is the Master of the Temple's case, given so fully as in this argument of Lord Bridgman." F. H.

(*r r*) Jon. 155. cited to this purpose in 5 Bacon's Ab. 629.

(*s s*) This limitation of the privilege is recognised in 1 Hatsell 67. 3d edit.

party, and a process of distringas by command of the King to the sheriff. And in all times the King's process out of the Exchequer hath gone out, though the party was privileged: the process I say hath gone out for the King, without breach of privilege; though I do not say it hath been always served.

But, secondly, I answer, that it is the fault of the defendant if a distringas or attachment issues, for he might appear by an attorney upon the summons returned; and so the plea might be continued by *dies datus*, *et dies datus ulterius*, during the time of privilege: and it is no reason that he should take advantage of his own wrong to discontinue the plea.

But, thirdly, it is not (as I have shewn in the case of an original) the suing out of process (whereby the plea is continued *in statu quo nunc)* that breaks a privilege; for it neither disturbs his person, his lands, or goods: but it is the execution of the process which doth it, let the return be what it will be, either *nihil habet*, or summons, or attachment, or *trade*; being filed with the *custos brevium* without carrying it to the *filacer* to make process, it is depending, and of record sufficient to keep it out of the Statute of Limitation without entry on the roll, or process awarded. And if, after the time of the privilege expired, an examined copy be brought to the filacer under the hand of the secondary to the *custos brevium*, the *filacer* will make process at any time after, according to the return, and make an entry and award upon a roll of the term wherein the original is not returnable.

And so in our case an original may be returned with a *nihil*, (which is by the course of the court usually done without the sheriff;) and is a true return, if the action be laid in any county where the defendant hath nothing, as it may in debt, and other transitory actions; and then filed with the *custos brevium*. And after the time of privilege expired the filacer will make an entry, and award of *capias* upon the roll, and continue it from term to term, by *vicecomes non misit breve*, into the return of that process; so that nothing is done to the prejudice or disturbance of the person or estate of the defendant, during the time of privilege of parliament.

So that, in our principal case, the plaintiff might have sued out his original within the time of limitations. He might have filed it with the *custos brevium*, and have continued it from term to term; and not doing it, he is barred by the Act of Limitations, according to the rule of law, *vigilantibus et non dormientibus jura subveniunt.*

This first point, (as I have argued it) makes an end of the case, so that I must speak to the next by way of admittance; for supposing there was no fault in the plaintiff, in not suing

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out his original in the life-time of the late King. And the point is this:—The plaintiff did not sue out his original, or prosecute the defendant from the 30th January 1648 (when the late King died) till after the 29th May, 1660; that is, during the time of usurpation of the government, when the Court of Chancery, and other courts, were open, and justice between party and party was administered under usurpers: but no court of the King was then open. Whether this shall be turned to a laches to the plaintiff? If there were no laches in the plaintiff in this respect, yet whether he shall be barred by the Statute of Limitations, is the next point which falls under consideration.

No court of the King was open from the 30th Jan. 1648, till after the 29th May, 1660, which was the time of usurpation.

But I hold as to this point, that the plaintiff is no more prejudiced by his not suing in those courts, held during the time of usurpation, than if there had been no courts at all held in that time. For I do conceive, that when there is an unlawful change of government by rebellion, or other usurpation, and new courts, under another government, that the proceedings of and in those courts are wholly voided by the King's just re-assumption of the actual exercise of his kingly government; and this appears by the act of parliament, 12 C. c. 4. pleaded by the defendant himself; that all proceedings then depending would have been void and quashed, if they had not been made good by that act; but more clearly by the act for confirmation of judicial proceedings, 12 C. 2. cap. 12. which provides, "that those former proceedings in the Courts at Westminster shall not be avoided for want or defect of any legal power in the said courts, or for or by reason of the wrong style or *teste*," which implies that, without an act of confirmation, they had been void by the judgment of the parliament. And whatsoever the law may be in the case, where there were several competitors to the title to the crown, and *jus dubium* for acts done by him, that *de facto* had been King in possession, as in the case of H. 6. and E. 4., wherein there are many considerations and distinctions, not proper for this place, nor necessary for the arguments we have in hand, that will come nothing to this case, where there was a perfect change of the government, as well as of the governor, and of the whole frame of the courts and proceedings in law; and the time must be looked upon in that respect (though it is not pleaded) to be as *ad tempus guerræ*; for *tempus pacis* is defined, Co. Com. 249. out of the records, 1 E. 3. and 28 E. 3., *quando cancellaria et aliæ curiæ Regis sunt apertæ quibus lex fiebat curiumque prout fieri consuevit*; which being the definition of *tempus pacis*, it follows, that it is *tempus guerræ*, when the King's courts of justice are not open, as they were not during that usurpation. But of this

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I shall enlarge no more at this time; for I may have occasion to speak of it hereafter, upon a case now depending in the King's Bench, and cited at the bar. (*t t*) But, secondly, I conceive, though the acts of 12 C. 2. c. 4. and 12 C. c. 12. do confirm and make good the acts and proceedings of the courts held during that usurpation, yet it is no good inference that every man was therefore bound to commence suits in those courts, or to be tied up to the prejudice which ensues upon not suing in lawful courts during time; for the words of the acts of parliament of 12 C. 2. reach not to make them lawful courts *ab initio*, but to make the acts done in those courts good. I will not say, that whilst those courts were *in esse*, and we who lived here were under that tyrannical power, it was simply unlawful to sue in those courts. The learned Dr. Saunderson, in his fifth lecture *De Obligatione Conscientiæ*, hath otherwise defined; for, though he saith that laws made by them who have not *legitimam potestatem* are but *equivocæ leges, et violentiæ magis quam leges*, and so *non obligant in conscientiâ;* yet, saith he, it is not only lawful, *bono civi*, to obey such laws, *aliaque ab iis imperata, modo non sit factu turpe, aut injustum quod imperatur facere, verum etiam postulante humanarum rerum conditione eo necessitatis deveniri posse, adeoque sæpissime deveniri, ut si sic fecerit defecisse officio suo existimandus sit;* and he instances these in particular, "*pro defensione patriæ adversus externam vim;* and in cases of administration of justice as suing for debts, and upon contracts, and other acts of justice, distributive and commutative." But even in those cases where I might sue in those courts, if it be only my own advantage which was concerned, it was much better and more heroic to refuse to sue in those courts.

Courts of law in times of usurpation.

Saunderson 176.

If rebels come to men's houses, and *pro timore mortis* they give them victuals, and go along with them, *et quod recesserunt quam cito potuerint*, this was adjudged no treason in Sir John Oldcastle's case; yet to have refused to have given them victuals had been more heroical.

And so in our case, he that out of detestation of the usurped authority forbore to sue for his just rights till His Majesty's restoration, did not only what was lawful, but what was much better (unless in some particular cases, and in consideration of some particular circumstances,) than he that did sue for them. And therefore the law, (which was in truth the law of the land, which did never die, though suspended in the exercise of it, by reason of the usurpation,) not requiring the

(*t t*) In Biron *v.* Dudley, 1 Siderf. 173. Hil. 15 and 16 Car. 2.

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plaintiff to sue in those new courts, nor looking upon them, nor countenancing them as courts, we ought not to extend the act concerning judicial proceedings, which was only for confirming the acts done in those courts, to go any further than to those acts and proceedings thereupon, and not to the courts themselves; nor to have any relation to do another wrong, who did that which was commendable in forbearing to sue in any such courts held under usurpers.

Statute of Limitations.

III. The third point is this:—Taking it for granted, there was no lachess in the plaintiff in not suing in the courts held during the time of the usurpation, nor in not suing out his original during the life of the late King, whilst the defendant was member of parliament, whether the plaintiff shall be barred of his action by the statute, 21 Jac. c. 16. of Limitations, the six years and much more, after the cause of action being incurred, or that the plaintiff shall have six years more, to be accounted from the time of the impediments removed within the equity of that statute. The words of the statute, 21 Jac. are "That all actions of trespass *quare clausum fregit*, all actions of trespass, *detinue*, actions in trover and replevin, all actions of account, and *upon the case*, other than such actions as concern the trade of merchandize between merchant and merchant, and their factors and servants; all actions of debt, grounded upon any binding or contract, without specialty, all actions of debt for arrearage of rent, and all actions of assault, menace, battery, wounding, and imprisonment, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) the said actions *upon the case* (other than for slander) and the said actions for accounts, and for trespass, debt, detinue, and replevin, and the said actions of trespass *quare clausum fregit*, *within six years next after the cause of such actions* or suits, and not after; and the said actions of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suits, and not after; and the said actions upon the case for words within two years next after the words spoken—and not after." Then follows a clause, that, "If a judgment given for the plaintiff be reversed for error, or if verdict for him, and matter alleged in arrest of judgment, judgment be given against him, that he take nothing by his plaint, writ or bill; or if, upon an action brought by original, the defendant be outlawed, and after reverse the outlawry, that the plaintiff may commence a new action or suit within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

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But this, as it doth not in the letter, so it cannot in the equity of it, extend to our case; for that it appears the action was not brought till after a year, *viz.* 17 May, Car. 2., and all impediments to the bringing of the action were removed 29th May 1660, 12 Car. 2.; and therefore the plaintiff by his replication claims the benefit of *six years'* time after the 29th May, 12 Car. 2., grounded upon the proviso in the act, the words whereof are these:—

"Provided, and be it further enacted, That if any person that shall be entitled to any such action of trespass, detinue, action in trover, detinue, replevin, actions of accounts, actions of debt, action of trespass, for assault, menace, battery, wounding, or imprisonment, action of the case for words, shall be at the time of any such cause of action given or accrued fallen or come within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, that then such person shall be at liberty to bring the same action, so as they take the same within such time as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, returned from beyond the seas, as other persons having no such impediments should have done."

So, upon this statute, I am of opinion that the plaintiff in our case shall have no relief. I observe, that within this proviso there is no mention of our action here, *an action upon the case;* but only of trespass, detinue, trover, trespass for assault, replevin, account, debt, *action upon the case for words:* but in the body of the act all actions upon the case, other than for words, are to be brought within six years next after *the cause of action;* so that it might be urged that this action here is within the body, and enacting part of the act, and out of the proviso. But I think that no advantage can be taken of that exception; though, I must confess, that act is in many things very ill framed; or very much abused in the print, (*u u*) which is fit to be examined; for it is clear the makers of the act intended to give the same liberty to infants, prisoners, and others, *in actions of the case*, as in other actions restrained to a time; and no reason can be assigned why it should not be so. And the words are sufficient to carry them; for actions of the case are actions of trespass generally, and not actions of trespass *quare clausum;* and the word "*trespass*" in this proviso may as well include *actions of the case*, though particularly enu-

The statute of 21 Jac. 1. of Limitations, is very ill penned, or very much abused in the print.

So adj. D. 2

(*u u*) It is noted in the edition of the Statutes, printed at the national expense, Vol. IV. p. 1223, that this proviso is annexed to the original act in a separate schedule; but the text previously published is not mentioned to vary from the record.

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merated before, as the words "*action of the case*" in the latter part of the enacting clause, that limits the suit to six years, *sur trover*, which is otherwise wholly omitted, though particularly and distinctly enumerated from action of the case in the former part of it. And, according to this exposition which I make, the practice hath always been, since the making of the statute, both in actions of the case, and actions of trover. So that, taking it for granted that our action of the case is within the proviso, it hath been urged that the plaintiff ought to have six years after the *impediment removed*, no fault being in him. And Ninian Monville's case hath been cited to prove it. The case was this:—Her husband was seised in fee; and after his marriage levied a fine with proclamations; and after was outlawed for treason, and died. And after five years, and many more after her husband's death, the heir reverseth the outlawry, and adjudged the fine: and five years did not bar her of her dower; but she had five years after the reversal. This is to be agreed for law, for she was barred of her dower so long as the attainder stood in force; and so by the reversal of the attainder her title of dower did *first grow unto her*. And so is she within the express words of the saving in 4 H. 7. c. 24., which saves to all persons "all such actions, rights, &c. as shall first grow, remain, descend, or come unto them after the fine, &c., so that they take their action, or pursue their right, within five years next after such action, right, &c. to them accrued, descended, fallen, or come." The attainder was an impediment which took away and prevented her from any right; for she had no title to dower, but by death of her husband, before which time the attainder intervened: but it was not an impediment which hindered her from claiming her right which she then had, for she had none. And in the marg. of C. pl. Cor. (*ww*) 216. it was agreed that she was within the words of the saving, 4 H. 7.

Co. Com. 216. (*ww*). Moor's Rep. 639.

But our case is *casus omissus*, quite out of the words of limitations. It is a bar within the body of the act; for the action did accrue, fall, and come above six years before the original brought; and it is not within the proviso, which reacheth only to cases of infants, *non compos mentis*, feme covert, imprisoned, or beyond the seas, and not to any other *impediment by the obstruction of justice, or otherwise*. And being out of the words of the act, I think there ought not to be any construction to bring them within the equity of it.

Where cases are out of the words of the Act of Limitations, construction ought not to be so made as to bring them within the equity of it.

(*ww*) "3 Co. Inst. is meant." F. H.

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The act is ushered in by a short preamble, but a pithy one, "*For quieting men's estates, and avoiding of suits*, be it enacted, &c." The same reason was the ground of the statute of 4 H. 7. c. 24. of Fines, to tie men to make claims within five years, "The King considereth that fines ought to be of greatest strength to avoid strifes and debates, and to be a final end and conclusion;" and the statute 18 E. 1. *modus levandi* fines is, that a "fine concludes not only such as be parties and privies thereunto, and their heirs; but all other people of the world, being of full age, out of prison, of good memory, and within the four seas the day of the fine levied, if they make not their claim of action within a year and a day by the country."

The reasons there being the same of barring men of their actions, if they bring them not within the time appointed by the Statute of Limitations, as it is for barring them of their actions and right by fine and non-claim, that is, for quieting men's estates and avoiding of suits, we may very well take our measure concerning the construction of this act of 21 Jac., by the construction which hath been made of those acts of fines in Stowel and Zouche's case, in the Commentaries. The case was,—A disseisor levies a fine; the disseisee dies within two years, his heirs being within age. The great question grew upon the statute of 4 H. 7., which hath an exception, and several savings (as ours here hath a proviso for infants, feme covert, and the like, whether or not the heir in respect of his infancy) not claiming within three years after his father's death (which made up five years, with that incurred in his father's life-time,) was bound, or might be helped by the equity of the statute, if he were not (as was endeavoured to be proved by some) within the law of the act. It was there resolved, that "the infant shall not be aided by any equity; for the act respects more the universality than the particularity, the peace of all more than the commodity of an infant or other private person; and for that the act is a positive law for time, which hath given certain and divers times to persons in divers degrees, to make any other time, is more against the mind of those who made the act, than with it." These are the very words of the book:— And Catlyn, Chief Justice, said, when an act is made to restrain all men to a time for the tranquillity and repose of the people, no time shall be gained by exposition or equity; no time shall be gained beyond the strict words of the act. And Dyer, Chief Justice of the Common Pleas, said, that common repose is more to be favoured than the private commodity of any single person, be he infant, lunatic, or of any other degree.

Com. 375.

Com. 371.

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The enacting part of this act of limitations is expressly, "that all actions of trespass, upon the case, &c. shall be commenced and sued within six years next after the causes of such actions or suits, and not after." I take it this binds infants, femes coverts, and the rest; and so doth the clause for foreclosure. And there had been no construction in equity against the law of the act to help against any impediment whatsoever, if there had not been a proviso. And the makers of the act did conceive so, else there had been no cause to make the proviso, or to give the plaintiff further time after judgment, or outlawry reversed. And this further appears by the like resolution upon the statute of 4 H. 7. It says, the fine shall be a final end, and conclude as well privies as parties to the same. If the act had stayed there, all persons, as well infants, feme coverts, as others, had been bound; no natural defect or impossibility should have exempted any. So it is agreed in Margaret Podger's case, 9 Co. 105. 19 H. 8. 6, 7; and it is also agreed by the Judges in Stowel and Zouche's case. And there Dyer gives the reason for it; for, saith he, infants, feme coverts, &c. are not the greater number of the people; and the law is reasonable which provides for the multitude, although some especial persons have less by it; and Catlyn argues it with a sentence out of Cato, viz. *ulla lex fieri potest quæ omnibus commoda, sed si majori parti prospiciat, utilis est.*

Com. 269.

C. C. 262.
Com. 360.
C. M. ch. 516.
8 Co. 100.
Lechford's case.

And we see the exposition accordingly upon the statute of Fines 18 E.; for that act providing only for infants, and those of nonsane memory, imprisoned, or beyond the seas, feme covert not being excepted, were bound to make their claims within a year and a day. And that mischief was the cause of the statute which ousted non-claim, 34 E. 3. c. 16, as our books say, and is provided for by 4 H. 7. It is true, the reason why a feme covert is bound is by some of the books given, because she had a husband who might make claim for her. But that is not the true reason; for an infant and a lunatic have guardians, and one imprisoned, or beyond the seas, might make attornies, who may claim for them. The reason is that which I said, there was not by express words any saving or expression for the feme covert.

So in our case upon the Statute of Limitations, the words being express, "that the action shall be commenced and sued within such a time, and not after," binds all persons whatsoever (whatsoever the impediment may be) after that time.

Thirdly, If they were not bound within the body of the act, they were not bound to any time at all, but might bring their actions forty years hence. That was Sir Thomas Cotton's case, Pasch. 32 Eliz. C. B. which goes under the name of

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Smye *v.* Innes, 3 Cr. 219, and is cited Co. *m. ch.* 519. Tenant for life levied a fine, he in the reversion being beyond the seas; if he had returned, he must have brought his action within five years after the death of the tenant for life. But he dying, his heir, he being excepted out of the body of the act (for that act of 4 H. 7. except those beyond seas, with a proviso, that if they do not take their actions within five years after their return, they shall be concluded,) his heir, I say, is not tied up to any number of years. Upon the premises it follows, that if the plaintiff be included in and so barred by the body of the act, the proviso enumerating the particular impediments, coverture, infancy, imprisonment, non-sane memory, and being beyond seas, for which they are not tied up to that time of limitation till the impediments removed; it leaves all other cases and causes of impediments out of the letter of the proviso, according to the reason of law, *exceptio probat regulam in casibus non exceptis.*

Many cases have been put, and more may be upon the stat. of 32 H. 8. of limitations (and upon the other statutes of limitations) of cases within the law, and yet out of the statute by construction; as homage, fealty, advowsons, &c. : but no case can be put where it is within the statute; and the time is enlarged beyond the law of the act.

And then as to the equity, there is none against the act for the reasons before mentioned.

Another reason is this, If there were any equity in this case to relieve against the statute of 21 Jac. for any impediments or defects whatsoever, it must be for such only as those are in the proviso for which there might be some colour; *ubi eadem ratio, idem est jus.* But all these are impediments or defects in the person who hath the cause of action, as infancy, imprisonment, being *oustre le mere*, lunacy, coverture of the party who hath the cause of action or right which should be barred by his non-claim; this is of another nature, there is no impediment or defect *ex parte querentis.* Many such cases may be put, where the party is barred; where time is material, though no fault is in him, as tenant for life, remainder in fee; a feme brings her writ of dower against tenant for life; he in the remainder levies a fine, (which fine and non-claim will bar a disseisee, or a stranger that hath right, as you may see, C. C. 298.) the five years pass, the tenant for life dies, the writ of dower is abated by his death. It hath been taken for law, that she hath no remedy, for that the writ doth not amount to a claim to avoid the fine; and many like cases may be put. It appears by this very statute of 21 Jac., that if a clause had not been inserted to give liberty for a new action upon a reversal

E. 50.

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by error, or of arrest of judgment, or outlawry reversed after the time of the statute, the plaintiff had had no remedy.

Thirdly, Consider the inconveniences if such a liberty should be given to evade the Statute of Limitations, because something hath happened without my default, that I could not sue within the time. A man owes me money, to be paid at such a day; before the day he dies. I have now to sue before administration taken,—shall I have six years from that time? Or the will is concealed, and kept from the executors, and administration is granted wrongfully to another;—shall I have six years after probate by the true executor? To put our case,—Suppose he against whom I have cause of action hath privilege of parliament; and that determines within one, two, or three years;—shall I have six years from the determination of his privilege, or the six years shall it be accounted *ab initio* from the first cause of action? If you will make it within the equity of 21 Jac., the six years must be from the impediment removed, as it is in those cases, and not from the cause of action; so that in all cases concerning members of parliament we shall not know when the Statute of Limitations will be in force.

The time of limitation for action of debt runs from the death of the debtor, not from administration to him being taken out, although the creditor has none to sue before that time.

Where a will is concealed, and administration granted wrongfully, a creditor of the estate shall have his six years to bring his action, from the death of the testator, not from the granting of the probate to the true executor.

In this case, if the plaintiff shall have six years after the privilege is over, a member of parliament is in a worse condition than another; for there shall be six years' time against him after the time and suit of another is out, and when his witnesses, and those who could clear it, are dead. Many like cases might be put. As a man speaks slanderous words of another, who is beyond the sea at the time, and so and by some other means comes not to know of it till after the two years appointed by the statute of 21 Jac. be expired:—shall he have a further time? The defendant dies, whereby the writ is abated after six years, without the plaintiff's fault,—shall there be a further time? If there shall,—what is that time? Six years? or so much of the six years as is not incurred? A man hath a right of entry to lands in the possession of a member of parliament,—shall he have five years after the twenty years given him by the statute to make his entry? A member of parliament commits an offence for which an information might be brought within a year,—shall the time be enlarged?—An infinite number of questions might be put upon this ground.

In case of slander spoken against one who is beyond sea, but returns within the time appointed by the Statute of Limitations, the act runs in favour of the slanderer from the time of the words being spoken. Where a writ abates by a defendant dying after six years from the time of the right of action commenced, the plaintiff shall have no further time.

And as to the other impediment; *vix.* that there was no Court of the King's nor seal of the King's since 1648, till his Majesty's return; if that keep the action out of the Statute of Limitations, then all men that had cause of actions since 1648, and before his Majesty's return, be they of what party soever,

upon this ground may have still six years to be accounted from the 29th of May, 12 Car. 2. to sue in. But *expedit reipublicæ ut sit finis litium*, and it is better to suffer a particular mischief than a general inconvenience; and such a one must happen if way be given to equitable constructions against the letter of the act, which is, that they shall be sued within six years after the cause of action. But it rests not there, but adds, "*and not after*," which negative words are the strongest words that can be in a law. By another statute of this parliament, 12 Jac. c. 4., it is enacted, that informations, and other popular actions, shall be in the proper counties, and before justices of assize, nisi prius, oyer and terminer, and gaol delivery, and *not elsewhere*. These negative words exclude the superior courts, even the King's Court, which had an universal and unlimited jurisdiction before. And so here the negative words exclude all time for bringing the action, but that which the statute doth expressly allow; for statutes in the negative bind the common law as it is said, 10 E. 4. c. 7. So that I hold there was a lachess in the plaintiff: he might have commenced his suit by original in the lifetime of the late King; he might have continued it since. But if he might not, yet the six years since the cause of action accrued being long since elapsed, the Statute of Limitations is a bar unto him; and so judgment ought to be given against the plaintiff.

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11 Co. 56. Dr. Foster's case.

Statutes in the negative, bind the crown. Br. Parl. 72.

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POOLE *v.* HASKEY.

Intr. 1658. Rot. 518.

(A lease being made to A. and B., for their lives, and the life of the survivor of them, and afterwards to the executors and administrators of the survivor of them for forty-one years: A. and B. cannot grant this term of forty-one years.) (*a*)

MS. No. 55. fol. 171.

I did also deliver this term the opinion of the Court in the case between Poole and Haskey.

The case was this:—A lease was made to Edward Poole and Henry Poole for their lives, and the life of the survivor of them; and afterwards to the executors and administrators of the survivor of them, for forty-one years, to be accounted from the death of the survivor of them, and from thence fully to be complete and ended. They grant the premises to another for their lives, and for the term of forty-one years, to be accounted from the death of the survivor of them.

And we were of opinion that this grant by Edward Poole and Henry Poole of the term of forty-one years limited to the executors and administrators of the survivor of them, being made before it was known which of them survived, was a void grant.

See for this my argument at large, and the difference there put between a remainder for years upon a contingent or other estate, and a future interest, granted to a stranger.

MS. No. 57. fol. 48. Argument at large.

BRIDGMAN, C. J.

John Poole hath brought an action of trespass and ejectment against George Haskey, of one messuage, 150 acres of land, 30 acres of meadow, and 50 acres of pasture, with the appurtenances in Cambridge, upon the demise of Ann Poole, April 10, 1658, for five years from the 25th of March then last past. Upon not guilty pleaded, there is a special verdict.

That Sir German Poole was seised of the lands in the declaration; and by indenture 27 Julii, 41 Eliz. de-

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(*a*) "It appears that at common law a possibility was not assignable, though it might be released in certain cases: but, however, there are many determinations by the Court of Chancery, which prove that at this day possibilities of personal estates are assignable in equity." Fearne C. R. 548. 7th edit. See Doe *v.* Tomlinson, 2 Maule and Selwyn, 170., and Wright *v.* Wright, 1 Ves. 411.

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mised them to Edward Poole and Henry Poole for the term of their lives, and the life of the longer liver of them; *et postea executoribus et administratoribns super viventis eorum dictorum Edwardi Poole et Henrici Poole, pro quadraginta et uno annis; computand. a morti super viventis eorum Edwardi Poole et Henrici Poole et abinde plenarie complend. et faciend., absque impetitione vasti.* And they find livery and seisin given. And the lessees entered, and were seised; and being so seised, by indenture 4 Decemb. 44 Eliz. granted the premises to Edward Poole the elder, his executors, administrators, and assigns, during the lives of the said Edward Poole the younger, and Henry Poole, and for the term of forty-one years, to be accounted from the death of the survivor of them, *et abinde computand. plenarie complend. et faciend.* And that the estate of the said Edward Poole the elder afterwards came to one John Curzon, as his executor or assign.

The Jury further find that after and before the time wherein, &c. *viz.* 3 Oct. Jac., the said John Curzon, Edward Poole the younger, and Henry Poole, by indenture tripartite, did grant, assign, and confirm to Thomas Milward, the tenements aforesaid, *habend.* to him, his executors, administrators and assigns, for the term of the lives of the said Edward Poole and Henry Poole, and during the life of the survivor of them, and afterwards to the executors and administrators of the survivor of them for and during the full term of forty-one years, to be accounted from the death of the survivor of them, and from thence fully to be complete and ended.

And they find the indenture *in hæc verba*, wherein there is a covenant, upon payment of 198*l.*, 4 Oct. 1624, for reconveyance of all except a close called Stonebench; and a letter of attorney to give livery and seisin.

And the Jury further find livery and seisin to be accordingly given; and the entry of Thomas Milward, and a demise by him, 1 May, 1657, to the defendant George Haskey, for ten years from thenceforth, who by virtue thereof entered, and was possessed.

That Thomas Milward afterwards paid to Edward Poole the younger, 170*l.*, in full satisfaction for the purchase of the premises.

That Henry Poole died, 24 Augusti, 1639.

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And that 24 Sept. 1640, Edward Poole died intestate.

And that 16 Sept. 1641, administration of his goods was duly granted by Dr. Twisden, commissary general to the bishop of Litchfield, to Anne Poole his relict, lessor to the plaintiff.

That the said Anne, as his administratrix, afterwards did enter into the premises, and did demise, *pro ut* in the declaration, to the plaintiff; who entered, and was possessed *quousque* the defendant ejected him, *pro ut* the plaintiff hath complained; *sed titrum super tota materia* the defendant be guilty or not, *ignorant et si, &c.*

Upon this verdict the case in effect is this:—A lease is made to Henry Poole and Edward Poole for their lives, and the life of the survivor of them, and afterwards to the executors and administrators of the survivor of them, for forty-one years, to be accounted from the death of the survivor of them; and from thence fully complete and ended. They grant the premises to another for their lives, and for the term of forty-one years, to be accounted from the death of the survivor of them.

And whether this be a good grant to convey the term for forty-one years is the question; for if it do not pass, then the plaintiff (being lessee to the administratrix of Edward Poole, who survived) hath a good title.

And I am of opinion that this grant to Edward Poole of the term of forty-one years, limited to the executors and administrators of the survivor of them, being made before it is known which of them survives, is a void grant. And so judgment ought to be given for the plaintiff.

I ground my opinion upon the rule of law; no man can grant or assign that to a stranger, which he hath not himself at the time of the grant to grant or assign. The law is so strict in this, that it allows not a man to grant a thing in action, as a bond; much less a right of action, nor a possibility to a stranger. It is the sixth question resolved in Lampet's case, 10 Co. 47. b. One possessed of a term for five thousand years, deviseth it to John Morrice for life, remainder to Elizabeth his sister. This executory interest cannot be granted to a stranger during the life of John Morrice; and yet it was an interest vested in her, and a possibility which necessarily must happen, for the law will not presume any man's life shall last five thousand years.

So if a man grant land before he hath an estate, and after the right of the land descend, or come unto him; this shall not bind him, if there be no estoppel in the case. And, therefore, in Sir Marmaduke Wivell's case, in my Lord Hobart, fol. 45.

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nt in tail of an advowson, and his son join in a grant of next avoidance; the tenant in tail dies; this shall not bind son, because he had nothing at the time of the grant, in session, or right, nor actual possibility.

shall not multiply cases upon this head; the learning is ious. But the reason is observable: the law so much ab- buying of titles and rights where there is not an actual te, as tending to multiplication of suits, and introducing of perty and maintenance, that it provides that no possibility ontingency, though necessarily to happen, no right, title, hing in action shall, be granted to strangers, though it may released to the terretenants.

low in our case, when the lease was made to Edward and ary for lives, and afterwards to the executors and adminis- rs of the survivor of them for forty-one years, it is clear t the term of forty-one years vests in neither of them at the e of the lease made, because it is not known which of them ll survive.

Lease for lives, two remainders for years, to the executors and administrators of the survivor,—the lease for years vests in neither of them.

deny not, but if either of them had been dead, that the te would have vested in the survivor, notwithstanding the te was limited to his executors; for in chattels, the limiting estate to the executors, where the party himself hath an ate precedent, vests it in himself; as in an inheritance, where limited to the heir, it vests in the party himself. And so the r is taken clearly at this day, the different opinions are in anner's case, 14 Eliz. 309.; and in Sparkes's case, 3 Cro. 840. . As it appears, C. Com. fol. 54. b. If a lease be made to one life, remainder to his executors for years, it vests in himself. But in this case both of them cannot have the estate, be- se it is limited to the executors of the survivor, and so to only; and who that one shall be *non constat* at the time of grant. In Biggot and Smith's case, 1 Croke, 102. in the chequer, and affirmed in the Exchequer Chamber, one kes a feoffment to the use of himself and his wife, and the rs of the survivor; and after the husband alone makes a ffment. And adjudged this feoffment was good against the e surviving, because the fee simple was in contingency; and Lampet's case, fol. 51. a., my Lord Coke puts the case out the register.—Lands are given to the baron and feme, and to heirs of the body of the survivor. This estate tail is t executed: and if they make a lease by indenture, and ob- ve the circumstances of leases by tenants in tail, required the statute of 32 H. 8., yet the lease is not good; for, by reason of the uncertainty of the survivor, the estate was not vested. The case is there put to be resolved, 17 Eliz. in B. R.

In chattels, the limiting an estate to the executors where the party himself hath an estate precedent vests it in himself, as in an inheritance limiting it to the heir vests it in the party himself.

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A lease is made to baron and feme for twenty-one years, remainder to the survivor of them for twenty-one years; and the husband grants away the term: this was a void grant for the uncertainty of the person; for although the husband may dispose of all chattels reals, which are the wife's, yet in this case neither the husband nor the wife *nad riens tanque survivor*, so are the very words of the book; which is our very case; saving that is of a baron and feme, and ours is of two joint-tenants. But in Croke's Reports of Anne Mayow's case (not printed among the other cases, because reported by my Lord Coke) Popham, Chief Justice, puts that very case to be adjudged, 17 Eliz. to be to two joint-tenants for twenty-one years, remainder to the survivor of them for twenty-one years; and in 3 Cro. fol. 841. in the case of Sparke, it is again cited so by my Lord Popham, so to be adjudged upon a limitation to two joint-tenants.

This being an authority *in terminis*, my brother Keelyng endeavoured to have avoided at the bar, by saying it was the same case with that which my Lord Coke puts of baron and feme; and allows it in that case to be law, because the feme having nothing, and not being able in law to join, the husband alone could not grant away his wife's possibility, or future estate. But two joint-tenants have a capacity to grant their possibility or future estate.

Admit they were but one case, as my brother would have it; yet this weakens not the authority; for it shews these Judges made no difference betwixt the case of baron and feme, and joint-tenancy, in this point; but that the same reason held in both cases; that the grant was not good, because neither of them had the estate, but it was uncertain who should have it.

Baron may dispose the interest of the feme be it a present interest, or a future interest, or possibility, as fully as if the person being sole had done it.

But, 2dly, I hold there is no difference in the reason of law in the case between baron and feme, and two joint-tenants, as to this matter; for, in case of chattels, I hold it regularly true the baron may dispose the interest of the feme, be it a present interest or a future interest or possibility, as fully as if the feme, being sole, had done it. And that appears by the principal case of Lampet,—a devise of a term for 5,000 years, was made to John Morrice for life, remainder to Elizabeth Morrice. She, having this possibility, takes husband; it is agreed that her husband's release to the devisee for life bars her, and discharges the possibility; and yet it was but a possibility, and in his wife's right.

But the true difference is between a conveyance by way of exoneration and discharge to the terre-tenant, or one that is concerned in the land, which the law allows, as it doth the purchase of a bare right or title; and the grant or assignment

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of it to a stranger, as our case is. And, therefore, as in Lampet's case, where a term was devised to one for life, remainder to another, a release to the devisee for life was held good. So in Johnson and Trumpett's case, Car. 1. B. R. it was adjudged that a release or discharge to him in reversion was also good; for it enured by way of exoneration, or discharge, of the estate in both cases. In Lampet's case it was further agreed, if the devisee for life, and the baron, as that case is, or other person who hath the executory interest, had joined in a grant to a stranger, it had been a good grant. But the reason is apparent: the whole estate in law moved from the devisee for life, and so must have been pleaded; the executory interest passed only by way of discharge and exoneration; and it wrought only as to the confirmation of the estate passed by the first devisee. And so it is expressly said in the book "that it is the grant of him that hath the term, and the release or confirmation of the other." And upon this ground of passing an interest, by way of exoneration and discharge, it might have been of more doubt in our principal case, if Edward and Harry Poole had joined in a release, discharge, surrender, or rather defeasance, of this contingent estate for forty-one years to him in the reversion, whether it had not not been good; I say it had been a greater doubt. I do not say it had been good; for it much differs from Lampet's, and those other cases there put. There was an actual possibility vested, which would descend to an executor, though the person who had the possibility had died: but it is not our present case, and I shall not now deliver any opinion on it. But in our principal case, it being a grant to a stranger, it is against the reason of law, as well as against the authorities before-mentioned, that it should be good; there being no estoppel, because the whole truth appears upon the indentures themselves.

Release or surrender of contingent estate for years.

If the assignee of Edward and Harry Poole had brought an *ejectione firmæ* upon the assignment,—upon whose lease should he have declared? If he had declared upon a lease by both, that had not been true; for it was not granted to both, and so not good according to the reason of Treport's case, 6 Co. And he cannot declare upon the lease of one, because he knows not which one that is.

My brother Keelyng would have this term for forty-one years not to be a remainder but a future interest; and objected, there was no contingency in the estate, for it is certain there must be a survivor; and it is certain the forty-one years must commence after the death of the survivor; and so there being only a contingency in the person, and not in the estate, all

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persons *quoad* interest concurring, it might be assigned over; and he urged Littleton's case, Litt. Sect. 648. that every land of fee simple may be charged in fee by one way or other. And, therefore, though in the case of a parson the fee be in abeyance, yet the parson, patron, and ordinary, being all the persons *quoad* interest, their grant is good; for none shall have prejudice but they, their heirs, and successors; and so here the grant is good, because all the persons who are concerned joins in it.

Whether this term for forty-one years to the executors of the survivor, after the death of Edward and Henry, be a bare future interest, or a remainder, will not be much material to our case; neither is there much difference between a mere future interest for years, and a remainder for years, it being a

A remainder for years hath not that dependency upon the precedent particular estate, as a remainder of freehold hath.

case of a chattel; for a remainder *for years* hath not that dependency upon the precedent particular estate, as a remainder of freehold hath: but, though the particular estate be gone, yet the remainder being once raised, it may subsist without the particular estate, there being no inconvenience by abeyance, a suspension of the freehold, as the case would be, if a remainder of the frank tenement were in abeyance or suspension. But whether it be a remainder or future interest, and not a remainder; yet it is not a present title to a future interest or remainder. As where lands are limited to A. B. for twenty-one years, after the death of J. S., A. B. hath a present right to a future interest. But in this case of limitation of the term to the executors of the survivor, it is a contingent interest not vested till the contingency happens; and so till then not to be granted.

But I hold in our case it is a contingent remainder for years, and that there may be to some purposes a material difference between a bare future interest, not depending upon such a particular estate, and a remainder; and, therefore, in our case

If lands are given to two for their lives, remainder after their deaths to their executors or administrators for forty-one years; if they surrender or otherwise determine their estates for lives, the forty-one years begin presently.

lands are given to two for their lives, remainder after their deaths to their executors or administrators for forty-one years, I hold, if they surrender, or otherwise determine their estate for lives, the forty-one years begin presently; because it was a remainder immediately depending upon the other estate which is determined. And though it is limited to begin after their deaths, and they are not yet dead, yet that limitation was but *expressio eorum qui tacitè insunt;* for it would naturally have begun after their deaths, if it had not been expressed. And so it is if they had granted away their terms for forty-one years,

And so it is if they had granted away their term for forty-one years, and after surrendered their estate for lives, the grantee might have entered presently.

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and after surrendered their estate for lives, or destroyed it by fine, the grantee might have entered presently. And it alters not the case, that the forty-one years is limited to be computed from the death of the survivor; for the law would have supplied those words without that limitation. The time of the commencement of the forty-one years, of its own nature, was to be accounted from the death of the survivor; and if it commenceth sooner, it is not the natural but accidental time of commencement of it. But now, if a lease for life be made to two, and then by another deed a lease is made to a stranger for forty-one years, to begin after their deaths, which is a bare future interest, although they so surrender or forfeit their estate; yet this future interest, as I conceive, shall not commence till after their deaths, because it was not a remainder depending upon the former estate, but the limitation for the commencement of it is collateral.

And, therefore, as to the distinction that is put, that here is a contingency in the person and not in the estate; I am of opinion (though I do not help myself upon that point) that in our principal case here is a contingency in the estate, for the estate for lives may determine before the term for forty-one years vests. As if Edward and Henry should surrender to the lessor, or both levy a fine *sur conusance come ceo, &c.*, which is a forfeiture, their estates are determined before the forty-one years vested in either, and so before it ever rise.

And the law looks upon a far more remote possibility than that, as we may see in Sir Hugh Cholmley's case: if lands be given to A. for his life, remainder to another for the life of A., the law looks upon this remainder as good for the possibility of determination of the other estate by forfeiture. And I conceive it to be a good rule in law, that where an estate for years is limited, or future interest, and when it should begin there is none to take it, that it shall be void. As if lands be limited to J. S. for life, the remainder to the first son of J. D. for forty-one years; and J. S. die, or his estate determine before J. D. have a son, this term shall never rise, because there was none to take it when the estate did determine. So in our case, if Edward and Henry determine the estate limited to them for their lives, by surrender or forfeiture, the estate for forty-one years to the executors of the survivor of them being to take place upon the determination of their estate for lives, and none being then to take it (for it cannot vest jointly in both) it must, therefore, be void.

It is a good rule that where an estate for years is limited, or future interest, and when it should begin there is none to take it, that it shall be void.

But whether there be any contingency in the estate or not, the uncertainty of the person, as I said before, at the time of the grant made, is sufficient to make the grant by Edward and

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Henry of the term of forty-one years (which neither of them then had) to be void. For as for Littleton's case, the reason given by him why a rent given by a parson, patron and ordinary is good, is, because those who have the interest join in the grant. They had all a present interest; none had any future interest: and the same law is of an alienation of the land. But put the case, that the patron was but tenant for life of the advowson, with the remainder to the right heirs of J. S., the joining of the patron with the parson and ordinary would not make the grant good, because all the interest was not in them. And the difference is well taken, C. C. 343. a. "Where the right of fee simple is perpetually by judgment of law in abeyance, without any expectation to come *in esse;* there he that hath the qualified estate, *concurrentibus his quæ in jure requiruntur*, may charge or alien it. But when the fee simple is in abeyance, and by possibility may every hour come *in esse*, as if a lease for life be made, the remainder to the right heirs of J.S., the fee simple cannot be charged till J.S. be dead; and so is Littleton to be understood,—*viz.* that either it may be charged *in præsenti*, or *in futuro;*" these are the words of my Lord Coke, and in reason come fully home to our case. Edward and Harry Poole, all the time of this grant, had no estate in this term granted; and so all persons *quoad interessebant* did not join.

2dly, The estate was in abeyance or contingency; and by possibility might every hour come *in esse;* and could not, therefore, be conveyed before.

So that upon the whole matter, the grant being void, as being made before Edward and Henry had any thing in the term for forty-one years, Edward after surviving, it first vested in him; consequently it is in his administratrix, the lessor of the plaintiff; and therefore that judgment ought to be given for the plaintiff.

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PINKER *v.* LITCOTT. (*a*)

Intr. Mich. 15 Car. 2. Rot. 411.

ng lessee of lands of the Chancellor of St. Paul's, for the life nself, and of his two sons B. and C., grants all his estate in to trustees to the use of himself for life, and after his de- to the use of Rebecca, his wife, for her life, and after her de- , to the use of his son B., and his heirs ; the whole estate of vested in himself by the first limitation ; and by the third ation, a use is executed in B., and his heirs, by way of spring- se. *Scintilla juris.)*

MAN, C.J.

tione firmæ by Vincent Pinker against John Litcott, he demise of Francis Litcott, of the rectory of Yeling, ise Elling ; 1 messuage, 50 acres of land, 20 acres of mea- and 20 acres of pasture, with the appurtenances in Yel- herwise Elling, upon the general issue a special verdict and before me,— Harg. MS. No. 57. fol. 150.

That Thomas Turner, Chancellor of the Cathedral Church of St. Paul, London, was seised of the said rectory of Yeling, otherwise Elling, *(unde tenementa infra scripta cum pertinentibus in quibus suppon., &c. sunt, et a tempore, &c. fuerunt parcell.)* in his demesne as of fee, *in jure cancell. suæ præd. ;* and being so seised, &c. 13 August, 12 Car. by indenture, &c. demised the said rectory and tenements to Thomas Litcott the elder ; *habend. to him and his assigns, during the natural lives of the said Thomas Litcott the elder, and of Thomas Litcott his son, and heir apparent, and of Francis Litcott, his second son, and the lives and life of the longer liver of them.* That 15 August, 1636, livery and seisin was duly delivered to the said Thomas Litcott the elder ; by virtue whereof he was seised in his demesne as of freehold, for the term of the lives of the said Thomas Litcott the elder, and of the said Thomas and Francis the sons, and the longer liver of them ; and being so seised, *postea, &c.* 15 Sept. 18 Car. 1. the said Thomas Litcott the elder, by in-

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he argument of counsel in e is reported by Carter 45. e was "adjudged, 17 Car. 2. ." Harg. MS. No. 57, fol. The Roll states full entry of the special verdict; and that the judgment was against the defendant, which is contrary to the opinion of the Chief Justice.

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denture, did grant, assign, and transfer to Thomas Flexney, John Grubb, and John Allison, and the survivor of them, and their executors and administrators, and the survivor of them, the rectory and tenements aforesaid, and all the estate of the said Sir Thomas Litcott the elder, of and in the same, *habend.* to them and the survivor of them, and their executors, administrators and assigns, and the survivor of them, for and during the lives of the said Thomas the elder, and Thomas and Francis the sons, and the longer liver of them, to such uses, intents, and purposes, and under such conditions, limitations, and agreements, as are after in the said indenture limited and expressed, and to no other use, intent or purpose, viz. *To the use of the said Thomas Litcott the elder, for his life; and after his decease, to the use of Rebecca his wife, and of her assigns, for and during the life of the said Rebecca, if the said Thomas and Francis the sons should so long live; upon trust,* confidence, and condition, that she and her assigns, out of the profits of the premises, should maintain, breed, and educate, all the children of the said Thomas Litcott the elder, with all necessaries needful and useful for their occasions, and as the children of the said Thomas and Rebecca; and should allow and pay out of the premises 50*l.* yearly, to the said Thomas the son, at the four feasts, &c. when the said Thomas the son should attain the age of twenty-one years, and also to the said Francis, and to Peter Litcott, and John Litcott, other sons of the said Thomas the elder, 40*l.* apiece yearly, in manner and form aforesaid, when they should attain their ages of twenty-one years; and after the death of the said Rebecca, that the said Flexney, Grubb, and Allison, and the survivor of them, and the executors and administrators of the survivor of them, should stand and be seised of the premises, *to the use of the said Thomas Litcott the son, his heirs and assigns, for and during the lives of the said Thomas and Francis, the sons, and longer liver of them; upon condition* that the said Thomas Litcott the son should become bound by obligation, with sufficient sureties, to the said Flexney, Grubb, and Allison, and the survivor of them, the executors and administrators of them, and the survivor of them, to pay to the said Francis, Peter, and John, the said several sums and annuities yearly

as aforesaid. And the Jury further find livery and seisin duly given to Thomas Flexney, to the use of the said Flexney, Grubb, and Allison, and their assigns; by virtue whereof, and of the Statute of Uses, the said Thomas Litcott the elder was seised of the premises as in his demesne as of freehold for the term of his life, remainder *inde, prout lex postulat.* And they find the death of Thomas Litcott the elder, so seised, 20 Dec. 1643; and the survivorship and entry of Rebecca, 22 Dec. 1643, and seisin *prout lex postulat*, and her death, 1 Martii, 1649, so seised, *post ea quæ et ante, &c.* 4 Martii, 1649, Flexney, Grubb, and Allison, did enter and were seised; that 10 Apr. 1659, Grubb and Allison died, and Flexney did survive them, and held himself in the premises, and was thereof sole seised *prout, &c.* that afterwards, and *ante, &c.* sci. 1 Maii, 1659, Thomas Litcott the son died; that afterwards the 20th of May, 1659, Thomas Flexney, by indenture, did demise to the said Francis and Peter, rectory *et tenementa præd. habend.*, one moiety to Francis, and *habend.* the other moiety to Peter, and their executors, administrators and assigns, from the annunciation, &c. then last past for forty-one years, if Francis should so long live; by virtue whereof Francis entered, and was possessed, *prout, &c.* and made the lease to the plaintiff *prout, &c.* by virtue whereof the plaintiff entered, and was possessed; and being so possessed, the said John Litcott, the defendant, being the son and heir of the said Thomas the son, after the said twentieth day of July did enter, and eject the plaintiff. *Sed utrum super totâ materiâ*, the defendant be guilty of the trespass and ejectment, ignorant, &c. *et si sic.*

he case in substance is but this:—Thomas Litcott the , being tenant for the lives of himself and his two sons, mas and Francis, assigns to Flexney, &c. to the use of elf for his life; and after his decease, to the use of Rebecca, ife, for her life, remainder to the use of *Thomas, the son, his heirs.* Thomas, the father, and after Rebecca died; rantees entered; Thomas, the son, died; the defendant heir. Flexney, the surviving grantee, leaseth to the lessor plaintiff; who making the ejectment lease to the plaintiff, defendant being heir to Thomas the son, entered upon

that the question is, whether any estate was executed by

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the statute of 27 H. 8. of uses in Thomas the son, or the defendant his heir; for if it were not executed, then the estate in law, after the death of Thomas the elder, and Rebecca his wife, remained in Flexney, and the other grantees, under whose estate the plaintiff claims.

Ecclesiastical lease to A. for the life of A. and B. and C., he hath but one entire estate. 5 Co. 13. 3 Cr. 419. C. C. 41. b. 42. a.

And I hold there was a good estate raised to Thomas the son, the right whereof descended to John, the defendant, his son and heir; and his entry being lawful, judgment ought to be given for the defendant.

I shall rather open than argue the case, as being the clearest way to resolve what may seem difficult.

First, then, when the Chancellor of Paul's made a lease to Thomas Litcott the elder, for the lives of himself and his two sons, he had but *one entire estate*, determinable upon the death of the survivor of them three, and not several estates; and the pleading clears that, *virtute cujus*, he was seised in his demesne *ut de libero tenemento pro termino vitarum ipsius Thomæ Litcott, sen., et prædictorum Thomæ Litcott et Franc. Litcott filiorum et vitæ eorum diutius vivent.*

Where A. hath a lease for the life of himself and two others, B. and C. and grants the land for the life of himself, or for the life of B. or C., this passes the whole estate, and freehold, for the life in question; and there is only a contingency or possibility that it may come back to the grantor.

And, therefore, in the second place, to consider a little the nature of the estate; I conceive, if Thomas the elder had granted the land to grantees, for the life of himself, and not for the lives of his two sons also, this had passed the whole estate to the grantee; or for the life of either of his sons, and not for his own life, this had also passed the whole estate and freehold to the grantees. Not that the grantee had any larger estate than for the life of the *cestui que vie*, for whose life it was granted: but the whole *freehold* passed during that time, it being but one estate of freehold; and there was only a contingency or possibility of Thomas the father, or that *cestui que vie* for whose life it was granted, died before the others, that it should come back again to the grantor. As if tenant for life grant the land by lease and release, or other conveyance which makes no forfeiture, to A. for his life, A. hath the whole estate; that is, so far as that the grantor hath no estate left in him: but if A. die, there was such a possibility in the eye of the law, that the tenant for life might survive, that by virtue thereof the tenant for life shall have the estate again, if A. die before him.

If tenant for life grants the land to A. for life, *remainder to B.* for the life of tenant for life, the remainder is void.

But if tenant for life by conveyance, which makes no forfeiture, grant the land to A. for his life, remainder to B. for the life of the tenant for life, this I think is a void remainder; for when tenant for his own life grants it to A. for his life, by possibility A. might survive the estate; and so he hath the whole estate, and no remainder can be limited upon it: but A.

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hath it for the whole estate, but determinable by his own death; and, therefore, if he die, living the tenant for life, the tenant for life shall have it again.

Devise of a term to A. for life, remainder to B., is not good as a remainder, but it is good as an executory devise of the possibility to B.
10 Co. 47. Lampet's case.
4 Co. 66. Carter's case cited in Fulwood's case.

And the reason is the same with the common case of an executory devise of a term. If a man who hath a term for years, deviseth it to one for life, remainder to another, it is not good as a remainder: but being by will, it is good as an *executory devise*, and it shall vest as a possibility; but it is not grantable or assignable as a remainder.

A case was cited at the bar by Serjeant Maynard, to be adjudged, 13 Eliz.—Husband and wife tenants for life, remainder in fee to the husband; the husband makes a lease for years, and dies; the wife enters; the lessee for years hath a possibility which he cannot grant over. Whether the law be so, that the lessee for years cannot grant it over after such an eviction, may be questionable: but the reason of the case is good; if it be but a possibility, it cannot be granted over.

So here, if Thomas Litcott the elder had granted the land to A. for his own life, remainder to B., for the lives of his sons Thomas and Francis, I think it were merely a void remainder; for by possibility the father for whose life it was granted to A. might have outlived the two sons; and the estate being but one (as I said before,) for all the three lives, there remains after the grant to A. for the father's life but a possibility of an estate to B. after the father's death; which being but a possibility, and not a remainder, could not be granted over.

I cannot cite authorities in point to prove this; for it is but the latter end of Queen Elizabeth before it was resolved in Ross's case that such an estate for the life of the grantee, and of two others, was a larger estate than for his own life. But that being resolved, I think it is a necessary consequence that if he grant it for his own life, he hath no remainder in him for the two other lives, but only a possibility which cannot be granted over. As at the common law, if lands were granted to one and the heirs of his body, the donor had a possibility of reverter—if the donee died without issue, or his issue failed; but before the statute 2 Westm. *de donis* the donor had neither a remainder nor a reversion: but these are created by construction upon that statute. And that possibility of reverter was not grantable over; no more here is the possibility after the death of Thomas Litcott the father.

Possibility of reverter.

And this may be enforced from the common case. A bishop or dean and chapter may make a lease to A., for the lives of

3 Cr. 491. C. C. 44. a lease by bishop or dean and chapter to A. for his life, remainder to B. for his life, remainder to C. for his life, is not good.

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himself, and of B. and C. That is a good lease. But if it were to A. for his life, remainder to B. for his life, remainder to C. for his life, it is not good; for the waste of the first tenant for life would be dispunishable. Now, if being the *actual* (*b*) tenant for three lives, of himself, B., and C., he might grant it to one for his own life, remainder to another for the lives of B. and C., it would be in the same condition and mischief as if it had been originally granted to him for his life, remainder over for the lives of B. and C. My Lord Coke puts many cases where out of an estate for a man's own life, which is but one freehold, several freeholds may be derived. But all these cases are where the tenant for life, the grantor, hath a reversion still in him, or a *grant is made* (*c*) by the reversioner's consent; or that new estate is partly derived or tastes of the reversion. As if tenant for life leaseth to the reversioner for the life of the reversioner; this is neither forfeiture, for he in the remainder was party; nor is it a surrender. And some books say he hath a reversion in him; for to him his own life was greater than the others. But if he had granted the land to a stranger for the stranger's life, it had been a forfeiture, if there had been a livery; and if it passed by lease and release, or other conveyance, it would be of the same effect, the forfeiture only excepted, as if there had been no livery. It passed the whole estate contingently; for I take a difference where a man hath an estate for his own life, and there is a conveyance of him and the reversioner; either in granting to the reversioner, or to a stranger an estate for the life of the reversioner, or a stranger; or an estate of freehold is derived partly out of the reversion, and partly out of his estate; there perhaps a reversion may be said to be in the tenant for life, because the whole interest is not extracted out of his estate. But where tenant for life grants the land to another for the life of the grantee (if it be by conveyance which make a forfeiture) the old estate for life is gone, and he hath gained a new reversion in fee: but if it be by lease and release, or the like, the grantee hath an estate for his own life, determinable by the death of the tenant for life, the grantor: but there is no reversion in the grantor grantable over, because as great, and to some purposes a greater estate was granted to him out of his estate as it would bear; and it was but a bare possibility which he had of having the land again.

It is true, if land be granted to A. for life, remainder to B.

C. C. 42. a. See 1 E. 3. 14. 13 R. 2. dow. 55. 29 Ass. pl. 64. 1 Co. 137. Chudleigh's case, Fenner says a possibility may turn to an estate.

(*b*) "Actual" is supplied to a blank in the manuscript.

(*c*) The words "grant is made" are supplied to a blank in the manuscript.

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Land granted to A. for life, remainder to B. for the life of A., is not only a possibility of an estate to B.: but B. hath a present remainder, which he may grant over during the life of A.

for the life of A.; here is not only a possibility of an estate to B., but B. hath a present remainder, which he may actually grant over during the life of A. What is the reason? The remainder is not extracted out of A.'s estate for life, but out of the fee simple of the grantor; he might have granted the reversion for the life of A. by another conveyance, and that had been a present possession of the reversion. By the same reason he may grant it as a remainder. But in the case where A., tenant for his own life, grants the land to B. for his life, two estates of freehold are to be one to B. for his life, another to A. for his life, cannot be extracted wholly out of this estate of A. for his own life. But yet B. cannot have it longer than it is limited to him; and so he leaves a possibility of an estate, though not an actual estate to A. if he survive him.

This being the case at the common law, in the third place when this estate to Thomas Litcott for the lives of himself and two sons is by him granted over to the use of himself for life, and after of his wife for life, and after to the use of Thomas the son, and his heirs, we are to consider what operation the Statute of Uses hath in this case, and whether it make any alteration from the cases I have already put upon a grant of such an estate at the common law with remainders over.

Wherein there is no doubt but if Thomas Litcott the elder had granted his estate, which was for three lives, to Flexney, and the rest to the use of himself, or of a stranger generally, not limiting the use to himself, or to a stranger particularly for his life, the use would have been as large as the estate, and would have executed an estate for the three lives. And upon an estate for one or more a use may at this day arise, as it might before the Statute of Uses. Com. 851. Delamer and Bernard's case; and the cases there cited.

4 H. 7. 18.

Again, if Thomas Litcott, granting the estate for three lives, had limited the use only to himself for his own life, or to a stranger for life, and had made no further disposition of the use, and had died, the residue of the estate, after the use determined, would have gone to the grantees Flexney and the rest; that was resolved in Castle and Dodd's case. Though where tenant in fee makes a conveyance, and limits the use for life, and speaks not of the residue, it shall be to the use of himself, because he had the ancient use to him in fee; yet when tenant for life, or he who hath a particular estate, grants his estate, and limits the use for a particular time, it shall not return to him, but be to the grantee or conuzee, if it were by fine, although the conveyance were without consideration; because he who hath the particular estate is subject to the ancient

Mich. 5 Jac. B. R. 2 Cro. 201. Ancient rent and forfeiture sufficient consideration to raise an estate.

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rent and forfeiture, which is a sufficient consideration to convey the estate unto him.

When the estate is granted to Flexney and the rest, for the three lives, to the use of Thomas Litcott the father, for his life, and after to the use of Rebecca for her life, and after to the use of the son, and his heir, during the lives, the uses that are limited extend to and are as large as the whole estate, and there is no use or estate at all to Flexney and the other trustees: but by express words it is limited to those uses therein expressed, and no other; and, therefore, it differs from the other cases where only the use is limited in part, and not during the whole estate.

In our case, I do not conceive that the estate is executed so as to pass the estate to Flexney and the other trustees, to the use of Thomas for life, and after to the use of Rebecca for life, and after to the use of Thomas, the son, and his heirs during the residue of the estate, as by way of remainder, as was argued on the defendant's behalf, and as it would in case of the conveyance of an estate in fee simple to those uses. But the stat. 27 H. 8. having incorporated the use and the possession, I hold that the use now shall vest as the estate at the common law would; so that when the grant is to Flexney, and the rest to the use of Thomas Litcott the father, for his life, and after to the other uses; this first use vests the whole estate for three lives in Thomas the father, as such a grant at the common law would have done; and though this limitation of the use during the three lives be to Thomas the father, but for his life, and after to Rebecca, &c. yet I take it to be all one as if it had been regranted by a common law conveyance to Thomas for his life only. He hath the whole estate back again in use, but subject to a contingency, and determinable by his death, if he die living either of the other *cestui que vies;* and nothing vests in Rebecca, or Thomas the son. I have given the reason of it before by the common law; and the stat. 27 H. 8. makes the estate and the use to be in the same quality, manner, and condition; and if any estate should vest in Rebecca, and Thomas the son, then there would be an estate of a church lease to Thomas the elder for his life, remainder to Rebecca for her life, &c.; which would be dispunishable for waste, and not agreeable to the leases warranted by the stat. 13 Eliz.

But although nothing presently vests in Rebecca or Thomas, the son; yet I take it there is a great deal of difference—where the estate for the three lives is granted over to the use of Thomas the father, for his life, without any further limitation of use; for there he leaves the possibility or contingency, and

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enefit thereof to the grantees, who, if he die, shall enjoy it to heir own use; and—where the use of the three lives is limited o Thomas the father for his life, and after to Rebecca, and Thomas the son, during the whole estate; for now the whole state, without any intent of reserving a residue, is passed out f the grantees, and the use to Rebecca, if she survive Thomas he father, and after her decease the use to Thomas the son hall arise as the contingencies do arise; *viz.* to Rebecca if he two lives outlive Thomas the father, and to Thomas the on and his heirs, if either of those two lives outlive Thomas he father and Rebecca.

And it will be in reason the same with Chudleigh's case, here the case, to our purpose, was in effect but this:—A feoffment was made to the use of the purchaser for his life, and fter to the use of his first son (he then having none) in tail, nd so to his second and other sons, remainder to the use of Thomas in tail, with remainder over. It is there resolved hat the whole estate, without any *residuum*, is taken out of the eoffees; and all the present uses, as well precedent as subsequent to the contingency, are executed: but when the contingency of the son's birth happens *(if nothing happen to disturb* 1 Co. 135. a. *he estate in the mean time)* (*d*), the former seisin, and estate 1 Co. 137. a. f the feoffees was sufficient to serve that future use, which is here called a possibility to serve the future use when it came o use, and elsewhere called *scintilla juris* (*d*). So here the whole estate, by the limitation of the uses over, was taken out f Flexney and the other grantees, never to return to them; nd so much of the use as serveth to feed the estate in use of he father for his life, (that is, all of the estate determined by is death, and that he survived the other two *cestui que vies)* as executed in him. But when he died, that former seisin nd estate of Flexney, &c. was sufficient to serve the contingent use to Rebecca; and, after her death, to serve also the future use to Thomas the son and his heirs; for his is not a contingent use *upon* a contingent use to Rebecca, but *after* a contingent use; as in Chudleigh's case the contingent use to the econd or third son is good, though limited after the contingent use to the first or second son. And there is no question ut an estate for life may be granted to the use of Thomas itcott the son, and his heirs; and the heir shall have it as a pecial occupant, executed by the Statute of Uses.

Special occupancy.

(*d*) This case may, perhaps, be ound worthy of attention in the ontroversy on the doctrine of *scintilla juris*: See 1 Sanders on Uses, 16. 3d ed. Fearne, C. R. 298. 7th d. Sugden on Powers, 35. 3d. ed. It may not be improper to suggest, with reference to Sir Orlando Bridgman's opinion, that his Lordship *assumes* the report of Sir Edward Coke, of Chudleigh's case, to be accurate. See Sugden on Powers, p. 25.

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So that I hold that the whole estate is taken out of Flexney and the other grantees to use;—That it is vested in Thomas the father;—and, when he dies, the former seisin and estate of Flexney, to serve the use to Rebecca;—and when she also dies, that former seisin and estate is sufficient to feed and serve the use limited to Thomas the son and his heirs, during the residue of the estate.

Castle and Dodd's case, 2 Cro. 201.

An use cannot arise out of a possibility, or out of an use.

The cases that have been put, that a use cannot arise out of a possibility or out of an use, or can*not* (*f*) be larger than the estate, are good law: but, under favour, do not come home to our case; for here, all the uses did arise out of the estate which was granted to Flexney, &c.—Though they were not all raised at the same time, they did all arise, as the contingency happened, out of that estate for three lives, which was granted to Flexney, &c. The estate out of which those contingent uses to Rebecca and Thomas the son were to arise were certain, but the use to them were uncertain: but when those contingencies happened, that former estate of Flexney and the rest served to raise them; and this *scintilla juris*, or retrospect to the seisin, which the feoffees or grantees once had, is that which preserves the contingent uses.

Scintilla juris, or retrospect to seisin.

I know no authority that comes home to our principal case. Castle and Dodd's case was cited: but that was but this,—A., tenant for life, granted his estate to B. to the use of B. for the life of A. and B.; but if B, died, living A., that it should remain to A. B., the grantor, dies, A. still living; C. enters, and leaseth to D., and then dies, A. still living. That which was adjudged there was, that A. had not any residue of the use in him; that an occupancy shall be of an estate to use; and that C. had it as an occupant after the death of B.; and that the lessee of C. had it after his death also, as an occupant during the life of A.

Occupancy.

That case comes not home to our case; for there was not in that case a full limitation of the use as large as the estate, *viz.* during the life of A., but during the joint lives of A. and B.

2dly, There B. the grantee, out of whose estate the use was to rise, died; so that there could no use arise out of the estate of B., when the estate out of which it was to arise ceased. And, therefore, C. there could not take either by way of remainder, or as a contingent estate, but must take as an occupant by his entry, or not at all; otherwise perhaps if it had been limited to B. and his heirs, during the life of A. to the use of B., and after of C.; but when B. died, the use being to arise out of the seisin of B. cannot be any longer continued. And the

3 El. 186. 3 Cro. 721. Crawley's case.

(*f*) "Not," is supplied by the editor.

freehold being in abeyance till there be an occupant, there could be no use (though A. were living till there were an occupant; and when there is an occupant, he being a general occupant, could not be seised to the use of another estate raised by way of use. As to the use of A. during the life of B. may beget an occupancy if A. die before B., but that occupant hath no confidence or priority, is not subject to a *subpœna*, as I conceive, and shall not be seised to another use.

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In our principal case, Flexney, the grantee, is still living, so that there is a person *in esse* to whom the estate was made, an use upon the contingency happening (*viz.* the death of old Thomas and Rebecca) *in esse* to Thomas the son and his heirs, and Thomas and his heirs are persons *in esse* capable to take; and the intent of the deed is apparent, that Thomas the son, and his heirs, should have the *residuum* of the estate after the death of Thomas the father, and Rebecca his mother; and, therefore, (though I find no express authorities in the case) it being agreeable to the analogy and reason of law in like cases, that Thomas and his heirs should have it, I therefore think that Thomas, after his mother's death, might have entered; that if his estate was turned to a right by the entry and lease of Flexney, yet it was a right of entry, of which John his son and heir, the defendant, shall have advantage, and so his entry was lawful, and judgment ought to be given for the defendant.

There are in the special verdict two conditions found annexed to the estate in use, limited to Rebecca and Thomas the son. But it not being found whether they were broken or not, and John, who claims under Thomas being defendant in this suit, they cannot prejudice him in this action.

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DAVY *v.* KEMP (*a*).

(Devise of lands to A. and B. and their heirs; A. dies without issue before the testator, who does not republish his will after the death of A.; B. takes the whole of the lands in fee simple.)

BRIDGMAN, C. J.

Harg. MSS. No. 58. fol. 1.

Though the action be brought for the whole land, yet there is no question as to one moiety; for Margaret Kemp hath made out no title to one moiety. All the question is upon George Kemp the younger's title to the other moiety.

Touching which, the first point is this:—George Kemp, the elder, deviseth the land in question to John Kemp and Ferdinando Kemp, his sons, to have and to hold to them and their heirs for ever. Ferdinando dies without issue, and then George the devisor dies without any new publication of his will;—What passeth by this will to John?

It hath been argued, first,—That nothing passeth to John at all, and that the devise is void *pro toto*: or, secondly,—if it be good for a moiety to John, yet as to a moiety, which Ferdinando should have had if he had survived his father, it shall be void; and this opinion hath been strongly enforced upon the reason of Brett and Rigden's case, Com. 342. A devise was to Henry Brett and his heirs, and he dies before the devisor, the heir shall not take by this devise; for though he intended that the heir should have it, yet his intention primarily was,

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(*a*) S. C. Carter, 2. where other points in the cause are also noticed, but where the argument of the Chief Justice is less correctly reported than in the manuscript. Carter states that the whole Court agreed upon the point in question in this judgment, p. 4. A provision in the will, relied upon by Sir Orlando in the close of his argument, is omitted in the MS.: but it is thus stated by Carter, p. 2. "In case my personal estate falls short to discharge my debts and legacies, then I will, that so much of lands and tenements herein bequeathed to George and Ferdinando, my sons, as shall be sufficient to discharge them, shall be sold." Mr. Hargrave states, that this case seems to be alluded to in Scattergood *v.* Edge, 12 Mod. 283., and in Nurse *v.* Yearworth, 2 Mod. 9. And Holt, C. J. mentions it by the name of Davis's case, Gibb. 231. The passage in Lord Holt's judgment is as follows:—"There was a case in my Lord Bridgman's time, of Davis and ————. It was a devise to two persons and their heirs, and one of them died during the life of the testator; and the question was, Whether the survivor should take the whole or not; and it was held he should, which shews plainly it was a will and a disposition from the time of making it," 11 Mod. 120.

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that Henry Brett should have it, and that he should have power to dispose of it from his heirs; and the word *heirs* was insisted not to make them immediate takers, but to express the quantity of the estate which they were to take, and it was applied to the case here, where the devise was to two and their heirs. The primary intent was, that Ferdinando (who died) should have had a moiety to him and his heirs, and which he might dispose from the heirs, or from John his brother;—and the survivorship,—and that John might take it,—is but a secondary and consequential intention. And though there is no degree gained by an estate in survivorship, for the survivor is in by the devisor or grantor, yet the survivorship (if Ferdinando had outlived his father) would have transferred his moiety to John by disposition of law. But now, if it be good, it must be good as a disposition of the whole to John by the devisor himself, who intended him but a moiety; and from hence the argument was also drawn, that because it was intended that they should both take, and Ferdinando cannot, that therefore neither shall take.

This last, I confess, was not much pressed by the defendant's counsel, and interferes with the other reason; for, if the primary intention were, that each of the devisees should have a moiety, there is no colour of reason why John should not take a moiety, admit he were not capable to take the other moiety devised to Ferdinando; for though then he must be a tenant in common, not a joint-tenant, which differs from the manner wherein it was intended he should take, yet that which differences joint-tenancy, and tenancy in common, *viz.* survivorship, being but a consequential intent, shall not alter the primary intent, that John should have a moiety, by their own argument.

For that cause, if a man devise to A. for life, remainder to B. in tail, or fee, and the devisee for life die before the devisor, yet B. the devisee in remainder shall take, as is clear law (*b*), and agreed by the defendant's counsel; for, though he cannot take in manner and form, as was devised, immediate, yet it was intended he should take by the devise. And the substance,—that he should be taken by the devise,—shall not be lost for a variance in the circumstance,—how he should take by it. And the reason of the difference, which was put at the bar, between the case of a remainder, where the devisee for life dies in the life of the devisor, and Brett's case, fully proves our case as to one moiety; for it was said, Henry Brett had power to dispose the land wholly from his heirs; and, therefore, he, not taking as was intended, his heir shall not take. But the devisee for

3 m. 122, Rickman's case. Perkins, 109. Com. 344.

(*b*) Goodright v. Wright, 1 P. Wms. 397.

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life had no power to dispose of the estate from him in the remainder; and, therefore, he in the remainder shall take by the devise, though the devisee for life do not take; which reason, if it were the reason of that case, as I think it is not, holds much more here as to John's moiety, where a devise is to two, and their heirs, and one dies in the devisor's life, he could not absolutely dispose of the whole; and, therefore, his death cannot make void the devise for the whole. So that I shall say no more to that point:—I hold it very clear, John shall have a moiety.

But I am of opinion that John, the surviving devisee, shall take not only the moiety, but the whole, though Ferdinando died in the devisor's lifetime.

For, first, this case wholly differs from Brett's case; for there, "the heirs were not *intended* to be immediate takers,—*prisours*:—but the heirs are there named, to make a fee simple in Henry, the devisee, and not to make any other take an estate by them;" so are the words of the book, C. 345. But in this case, John is by the will to take, and immediately, though not solely; and being a joint tenant, he is a taker of the whole [for they are seised *per mie et per tout*] though not solely, upon the first making of the will.

In that case of Brett, there was no devisee at all; and so there must be a grantee, so there must be a devisee. That is the reason an *immediate* devise to an infant *en ventre*, to take *immediately*, and not *executorily*, is void; and, therefore, it was an imperfect will, Henry being dead, as to the devising any estate, for there was no devisee: but where the devise is to two, and one dies, there is still a person *in esse* who can take as a devisee.

An *immediate* devise to an infant *en ventre*, to take immediately, and not executorily, is void. (*c*)

It is like the case of attornment:—a grant is made to one and his heirs of a reversion, and he dies before attornment, his heir cannot have it; for there was none to take, the word "heirs" being words of limitation, not to take. But if a

(*c*) The tendency of subsequent decisions on the claims of posthumous children seems to be against the positions in the text, and to render the distinction unnecessary as far as relates to the interest of the children, and the presumed intention of testators. It has been inferred from the cases, "that a child in *ventre sa mere* shall be considered as absolutely born, wherever such consideration would be for his benefit;" Watkins on Descents, cited with approbation by Mr. Justice Buller, in Doe v. Clark, 2 H. Bl. 401. See the cases referred to in 8 Viner's Ab. 85, 86, pl. 3 and 6; and in the Supplement, Vol. III. p. 205. And in Fearne C. R. 535. See Skelton v. Bide, in p. 398, 399, 400, of this Volume, and Trower v. Butts recently decided by His Honour the Vice-Chancellor. Chapman v. Blisset, Cas. temp. Talb. 145. where, p. 150, Lord Talbot states that although in a will words be *in præsenti*, they must be taken in a future sense, in order to serve the intent. But query if the whole extent of the doctrine borrowed from the civil law has yet been applied, independently of the Statute 10 & 11 W. 3. to dispositions of real estate.

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grant of a reversion were to two, and one dies, attornment may be to the survivor; for there is the taker. But in that case, if both the grantees had died, attornment could not be made to the heirs of the survivor; for there was no grantee in the deed, the word "heirs" being words of limitation only: and so in our case, if both Ferdinando and John had died in the life of the devisor, the heirs of the survivor could not have taken by the will, because there were no persons to take. But the testator devised the whole to both, and not a moiety to each; and his principal intent was that, as well the one as the other, should have an interest in the whole land, and should sell, if the personal estate fell short for payment of debts.

And as for that which was objected, concerning the primary and consequential intent of the devisor, I answer, it was not his principal intent that Ferdinando should dispose a moiety away from his brother. The power indeed to dispose a moiety was a consequent of his devise, because it was a joint devise; that, therefore, he might dispose of a moiety; as it was a consequent of it, that if he did not dispose of it, it might survive; and when, by reason of death, one was not capable to take, it was reasonable in itself the other, who was capable to take, should take all for the performance of the will.

And from these answers to the objection upon Brett's case, I draw the reasons why, though the devise be to Ferdinando and John, and their heirs, and Ferdinando dies before the devisor, John, who survives the devisor, shall take all:—

First, For that John was capable in law to take all, and in such a limitation by deed he should have taken all; and it is a good rule that you ought to make construction of a will according to the construction of grants in like cases at the common law, unless the intent of the testator appear in the will itself, that it should be otherwise; which it doth not here. And, therefore, it is a clear rule in law, where an estate is limited to two, and the one is capable, the other not, he that is capable shall take the entirety. As if a gift be to J. S., and his first son, he having none at the time, or to J. S., and a monk; or to J. S. and J. D., who is not in *rerum naturâ*. So if a devise were made to A. and B., and their heirs, and there is no such person as A. at the time, B. shall take all.

6 Co. 17. Wild's case. It is a good rule that construction of a will be made according to the construction of grants in like cases at the common law, unless the intent of the testator appear in the will itself that it should be otherwise.

1 Co. 100. Shelly's case. It is a clear rule in law, where an estate is limited to two, and the one is capable, the other not, he that is capable shall take the entirety.

And as where a grant or devise is to two, and one is not capable at the time to take, the other takes all. The same reason is, where the gift is to two, and before the estate perfected (*d*)

(*d*) These cases correct the corrupt passage in Carter, p. 5. "So where land is given to two, and before the estate is perfected, one takes;" which

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one becomes incapable, which is our case, as appears by the case before cited of a grant of a reversion to two, and one dies before attornment, or a grant of a reversion to two, and one before attornment became a monk. And the reason is, there is one capable to take; and when the other cannot take, *ut res valent*, it is more reasonable the other should take all, rather than he that is capable should not take; which reason holds as well in devises as in grants.

3 Cr. 423.

The opinion of Popham and Fenner, in Fuller's case, went further; for there was a case put of (*e*) a devise to A. and his heirs, who was dead at the time of the will made, so as there was none such then *in rerum naturâ;* and, therefore, they held in that case, that the heirs should take as devisees, as if the devise had been only *to the heirs of A.*, he being then dead, there is clearly a good devise; for there the words *heirs* are words of purchase as well as limitation.

I do not go alone to affirm their opinion to be law: but it more than proves that which I mention it for; *viz.* that these two learned Judges held, that by a devise to two, one whereof is not *in rerum naturâ*, the other takes all.

In all grants and devises the law looks upon the general, or principal intent of the grantor, or devisor; and will uphold it, although there may be a variance in circumstances, or in the secondary or consequential intent.

The second reason, or rather enforcement of the other, is this:—in all grants, and so in devises, the law looks upon the general or principal intent of the grantor or devisor. And where there is a good grantee or devisee, and that general purpose or intent of the devisor may be preferred, though there may be a variance in circumstances, or in the secondary or consequential intention, yet it will uphold the substance and primary intention of the grant or devise.

5 Co. 46. Countess of Rutland's case.
9 Co. 1. Dowman's case.
Littl. s. 352.
2 Co. 80, 81. Cromwell's case.
C. C. 219.
Litt. s. 354. Performance of condition *cy pres.*

That is the reason of the common cases:—A man covenant to levy a fine to uses to such persons, and by such a time, though it be levied afterwards to other persons, or at another time, yet this fine shall be to those uses, if nothing appear to the contrary; for the substantial part was the granting it to these uses. And that is the reason of Littleton's case in his Chapter of Conditions, cited at large out of 2 H. 4. in the Lord Cromwell's case. If a feoffment be upon a condition to enfeoff the feoffor and his heirs, the feoffee hath time during his life, unless hastened by request; the feoffor dies; the feoffee is not now free from the condition, but must make it *cy pres* as near as he can. So if a man be bound to enfeoff two and their heirs, one dies, he shall enfeoff the survivor; for he must do

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seems to want the words "one becomes incapable" to follow the second comma. The opinion of Popham and Fenner is also mis-stated by Carter.

(*e*) See note (*d*).

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cy pres. Nay, if he were bound to enfeoff J. S. and his heirs, and J. S. dies, he must enfeoff his heirs. And it differs from Brett and Rigden's case, for that was a limitation of estate by the devisor; and the heir must take as the devisee; which he cannot but upon the condition the conveyance is to be made *de novo*, and so may be made to the heir. And this is the true reason of the case before put: if a devise be to A. for life, remainder to B. and his heirs; A. dies before the devisor, or refuseth, B. shall take immediately. Not because B. might dispose of his remainder, whether A. would or not, as was urged on the other side; for disposing or not disposing of it was not there within the primary intention of the devisor; and the reason of our case must be grounded upon the intention of the devisor, not the power of the devisee. But the intent of the devisor was, that B. should take an estate; and though it was intended he should not take immediately, but in remainder, yet rather than he shall not take at all, he shall take immediately; for the substance was, that B. should take an estate. And the variance in the circumstance and manner of taking it shall not make the will void. No more here. It was intended John should take an estate. He cannot by reason of Ferdinando's death take it jointly, therefore he shall take it as he may; that is Ferdinando being dead, he shall take it solely and entirely.

Construction *cy pres.*

Suppose a devise is made to baron and feme, and the heirs of their two bodies, they should have taken by undivided moieties; the wife dies,—shall the husband and children be deprived of this bequest because the husband cannot take by undivided moieties? In a grant or limitation of use, the husband would have had an estate tail,—why should he not have it in a will? Nay! why not much the rather? for his intention appeareth to give it from his heir, and that the husband and children should have it. Because the husband must take it in another degree,— not now by moieties, but entirely,—what reason is there that the substance shall be lost for this circumstance? And if you allow that case, you must allow this. In both cases the variance from the will is the same; the devisee takes by entireties.

Variancefrom the exact words of a will to satisfy the intention *cy pres.*

Thirdly,—in this particular case, the circumstances upon the will make this construction, (which is agreeable to cases at the common law,)—that the survivor (who only is capable to take) shall take the whole,—much more strong; *for he gives divers legacies and portions, and makes Ferdinando and John executors; and then devises that, in case his personal estate fall short, and be not sufficient to pay his debts, legacies, and portions, that so much of his lands bequeathed to his sons Ferdinando and John as shall be sufficient to pay the said legacies*

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and portions shall be by them sold for and toward the payment and satisfaction of the same. If we should go by the way of arguing in Plowden's commentaries, and ask George Kemp the devisor,—Did you intend, if Ferdinando die before John, that your debts, legacies, and bequests, should be unsatisfied, and your heir take all? would not he or we for him answer—No; my intention was contrary. Nay, would he not much more probably have said, I did for that cause limit it to my two younger sons and their heirs, to the intent, if one died, his part should not go to the heir at law, but to the survivor, to perform my will? And, lastly, I look upon this case as a case of more general concernment than it may seem at first. Men do as much or more at this day pass lands by will as they do by any one kind of conveyance. How frequent is it by will to pass over lands to divers trustees and their heirs, for the raising of portions, payment of debts, &c.; or to settle lands upon baron and feme, &c.? How frequently do some of these die before the devisor? It will be a very hard, I may say unreasonable construction, to make all these void by the death of one of the devisees.

So that I conclude, and for this first point I hold that John Kemp, surviving his brother Ferdinando, takes the whole which was devised to them by the will of George Kemp, the father.

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Intr. 15 & 16 Car. 2. Rot. 1442.

(A. seised of lands in fee devises them "to J. his wife for her life, and after her decease to E. M. his daughter for her life; and after the decease of J. and E. M., and also after the decease of E. L., then he willed to the issue of the body of E. M. upon her body by T. M. her husband, *begotten and to be begotten*, one annuity or yearly rent-charge of 40*l.* per annum, *equally between such issues to be divided:*' This is a contingent executory devise to such issues of E. M. as should be alive after the decease of J., E. M., and E. L.)

BRIDGMAN, C. J.

Harg. MSS. No. 56. fol. 150. Conusance.

Replevin by Robert Skelton against Sir Thomas Byde, Knt. for taking a gelding in a place called the Stable, in the parish of St. Leonard Shoreditch. The defendant makes conuzance, as bailiff of Richard Duke, for

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(*a*) Judgment is not entered on the roll in this case:—but the note in the manuscript, No. 56. fol. 150. is that it was adjudged *pro defendente* 21 Apr. 17 Car. 2. Mr. Hargrave remarks that there is no printed report of the case: but that it is cited in Nurse *v.* Yarmouth, in Lord Nottingham's MSS.; which were not delivered to the trustees of the British Museum with the rest of Mr. Hargrave's Collection.

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that the place called the stable, *in quo, &c.* is, and at the time, *in quo, &c.* was parcel of a messuage in the said parish, called the Blue Anchor; and that long before, &c. one Henry Hodge, now deceased, in his lifetime was seized as well of the said messuage, &c., *unde, &c.* as of four messuages and one garden, with the appurtenances, in the said parish, in his demesnes as of fee, and held the same in free socage; and so seized, *ante, &c., viz.* 20 Sess. 8 Car. *apud, &c.*, made his last will in writing; and by the same will did give the said messuage, *unde, &c.* inter alia, *to Joice his wife, for her life; and after her decease, to Elizabeth Mainwaring his daughter for her life; and immediately after the decease of the said Joice and Elizabeth, and also after the death of Edward Lively his son-in-law, then he willed and bequeathed to the issue of the body of the said Elizabeth his daughter upon her body by Thomas Mainwaring, then her husband, begotten and to be begotten, one annuity or yearly rent-charge of 40l. per annum, equally between such issues,* to be divided, to be issuing and going forth, and yearly to be received, had, and taken, of, out of, in, and upon the said messuage, with the appurtenances, *unde, &c.*, and the said other messuages, with the appurtenances, *unde, &c. per nomina, &c.*, or out of, in, or upon any part or parcel thereof, at four most usual feasts or quarterly days, *viz.* the feast of St. Michael, &c. or within twenty-eight days next after every of the said feasts, by even and equal portions; the first payment thereof to be made at such feast of the said feasts which should next and immediately happen after the deceases of the said Joice, Elizabeth, and Edward Lively, or within twenty-eight days next following the said feast, the said Joice, Elizabeth, and Edward being dead. And sets forth a clause of distress for the same in any part thereof (being in arrear twenty-eight days after the feasts) to and for such issues of the body of his said daughter by the said Thomas Mainwaring begotten or to be begotten, and their assigns; and to do all such acts concerning distresses as should be requisite and necessary, and as the law should permit. And that afterwards, and before the time *in quo, &c. Ult. Novem.* 8 *Car.* 1. *apud, &c.* the said Henry died, of such estate seised, &c. And after his death 20 Martii, 1650. *apud, &c.* Joyce died; and that afterwards, 21 Martii, 1650, *apud, &c.* the said Elizabeth died; which

Devise to A. for life, remainder to B. for life, remainder after the death of A., B., and C., for the special issue, begotten, and to be begotten of B. to take an annuity out of the lands; with a power of distress, if the annuity be in arrear.

Death of testator, 8 Car. 1.
Death of A. 1650, March 20.
Death of B. 1650, March 21, leaving special issue.

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Death of C. The issue seised of the annuity,

said Elizabeth *at the time of her death had issue, &c.* of her body by the said Thomas Mainwaring lawfully begotten,—Joice, Richard, Anna, and Thomas Mainwaring, *apud, &c.*; And that after her death, *viz.* the 21 *Martii, &c.*, the said Edward Lively, *apud, &c.* died; *after whose decease, the said Joice the daughter, Richard, Ann, and Thomas the son, were of the said annuity or annual rent of* 40*l. seised, in their demesne as of freehold, for their lives;* that is to say, every one of them the said Joice, &c. of a fourth part thereof *per se;* and the said Richard of his fourth part of the said annuity or annual rent in form aforesaid being seised, the said Richard *postea et autea, scilicet* 27 *Junii,* 12 Car. 2., *apud, &c.* by his writing indented between him *per nomen, &c.* of the one part, and the said Thomas Byde *tunc armiger, modo mil.*; and the said Richard Duke, *per nom., &c.* of the other part, *cujus altera parti sigillo, idem* Thomas Byde *hic in cur. profert cujus dat. est eisdem die,* and did grant to the said Richard Duke, his executors and assigns, for and during the term of ninety-nine years, if the said Richard Mainwaring should so long live. To which grant of the rent aforesaid, so made as aforesaid, one George Gray, then tenant of the freehold of one messuage, with the appurtenances, *ex quo redditus præd. est et tunc fuit exeuns postea et ante præd. tempus in quo, &c. scil.* 1 *Martii,* 15 *Car.* 2. *apud, &c. unde præfat.* Richard Duke *attornavit quam quod concess. et attorn. præd. prætextu,* the said Richard Duke was, and yet is of the said fourth part of the said Richard Mainwaring of the said annuity or yearly rent of 40*l.* for the said term of 99 years, if the said Richard Mainwaring shall so long live possessed. And because the fourth part of 40*l.* of the said annuity or yearly rent aforesaid, being 50*s.* at the feast of the Annunciation, 15 Car. 2. and by the space of twenty-days next after the said feast, after the said grant made by the said R. M. to the said R. D. in form aforesaid made, and after the said attornment so as aforesaid made to the said R. D. *prædicto tempore, &c.* was behind, and yet is unpaid, the said Thomas Byde, as bailiff of the said R. Duke, for the said 50*s.* of the said rent so being behind, doth well acknowledge the taking of the gelding aforesaid, in the place aforesaid, *in quo, &c. et juste, &c.*; and avers the life of the said Richard Mainwaring. Upon this conusance the plaintiff demurs; and for cause shews

27 June, 1660. Grant of one fourth part of the annuity to Richard Duke for 92 years, if R. M so long live, and attornment of the tenant of the freehold to grantee.

Fourth part of annuity in arrear.

Distress levied, and life of R. M. averred.

Plaintiff's demurs.

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that it appears not by the conusance that Elizabeth Mainwaring, the daughter of Henry Hodge, *at the time of the death of the said Henry had issue of her body by the said Thomas Mainwaring her husband begotten*, the said Joice, Richard, Ann, and Thomas the son, or any of them. The defendant joins in demurrer.

Cause of demurrer.

Joinder in demurrer.

The case is this:—

a replevin for taking of a gelding, the defendant makes sance as bailiff of Richard Duke; and sets forth that ry Hodge devised the Bell Inn, and other houses, to Joice ife, for her life; and after to Elizabeth Mainwaring his hter for her life; and *after the decease of his wife and hter, and of one Edward Lively his son-in-law, he wills and eaths to the issues of the body of his daughter by Thomas rwaring her husband, begotten, and to be begotten, a rent-ge of 40l. per annum, equally between such issue to be ed, to be paid quarterly, with clause of distress.*—That abeth had issue by Thomas Mainwaring living at her , Joice, Richard, Ann, and Thomas.—That after the of Joice Hodges, and Elizabeth Mainwaring, and Ed- Lively, Richard Mainwaring makes a grant for ninety- years, if he so long live, of his fourth part of the rent to ald Duke, in whose right the defendant makes conusance 0s., being the fourth part of the rent of 10*l.*, due at our yday, 15 Car. 2. Upon this conusance the plaintiff de- ; and for cause shews that it appears not Elizabeth Main- ng, at the death of the devisor, had issue, the said four ren, or any of them.

he general question will be, how the devise of the rent of to the issue of Elizabeth Mainwaring operates.

is limited to begin after the death of Joice the devisor's , and of the said Elizabeth her daughter, (to whom the s out of which it is to issue are limited for their lives) and the death of one Edward Lively.

is also devised to the issues begotten, or to be begotten, on body of the said Elizabeth: and it doth not appear upon conusance whether there were any issues born at the death e devisor; or whether there were any issues born before or his death, which died before Elizabeth Mainwaring.

he strongest against the defendant, (who in a replevin is *i actor*, and must set forth his title,) and the most for the ntage of the plaintiff, shall be taken to be the case. And efore it shall be supposed, if it be for the plaintiff's advan- , that Elizabeth Mainwaring had issue living at her father's h, who were then capable to take by devise. As also that

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Elizabeth Mainwaring had issue some born before his death, and some after his death, who died in the life of Elizabeth Mainwaring their mother.

This being supposed to be the case, I take it the matter of the question will be only this—Whether this devise of the rent of 40*l.* per annum to the issues of Elizabeth immediately after the deceases of Joyce, Elizabeth, and Edward Lively be only a contingent executory devise, and nothing in the rent passeth; or is vested in any of the issues by way of interest during the life of Elizabeth: and so no issues of Elizabeth, whether born before or after the death of Hodges the devisor, shall take during their mother's life; but those issues shall only take who are living when the rent comes to take effect in possession;—or whether, by this devise of the rent to the issues of Elizabeth begotten or to be begotton, any estate or interest in the rent do pass or be vested in any of the issues during the life of Elizabeth.

I shall examine this last first:—

Whether the rent do vest in interest to any of the issues during the life of Elizabeth; for though it commence not before, to take effect as to the permanency of the profits, being to begin after her death, yet there is no doubt there may be a present interest in a rent where it is limited to commence *in futuro:* as if a man makes a lease of land, or a grant of a rent to begin after three lives, the lessee or grantee hath a present interest vested in him, which he may grant or dispose, though the commencement of it in possession be at a time to come. And the law is the same in the case of a devise of land for years, or a rent to J. S., to commence after three lives, or a day to come, as it is of a conveyance at the common law. It vests a present interest; though it takes effect only *in futuro*, as to the perception of the profits.

There may be a present interest in land for a term of years, in a rent where it is limited to commence *in futuro*; and this by devise or by a conveyance at common law.

Now if any interest in the rent vest in any of the issues of Elizabeth before the rent commence in possession, that is, during the lives of Joyce, Elizabeth, or Edward Lively, this conusance is naught.

Or first, supposing that Elizabeth had issues when the devisor died; if the rent vested in interest in these children which were then born, it cannot vest in those which shall be after born. As if A. devise a rent, or land to the issues, or children of B., who is in life, the issues which B. had at the time of the death of the devisor shall only take, and not those which he shall after have.

A tenant for life, remainder to the issue of A. if the remainder be vested in the issue born at the death of the testator, after-born issue of A. cannot take.

That is the rule of the common law; if an estate be limited to two whereof one is capable, the other not, he that is capable shall take the entirety. As if lands be given to a man *et*

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primogenito filio, he having none at that time; or to a man and such woman as shall be his wife, the son born after a wife shall never take. And I hold the law to be the same in a case of a devise to a man *et primogenito filio*, or to a man and his wife that shall be: the man takes by the devise presently, but the intent appears not that the son or wife should take by way of remainder; and they cannot take as immediate devisees; and, therefore, not at all.

Devise to a man *et primogenito filio*, he then having none, or to a man and his wife, that the man takes shall be, the entirety presently. 6 Co. 17.

And this is warranted by the reason of Wild's case. "If A." (saith the book) "devise his landto B. and his children or issues, and he hath no issue at the time, this is an estate tail; for the intent is certain that the children or issues shall take; and as immediate devisees they cannot take, because they are not *in rerum naturâ*; and by way of remainder they take not, for that was not his intent, for the devise is immediate; and, therefore, they shall be taken as words of limitation, *viz.* to the children or issues of his body."

In that case, the words, it being a will, may properly bear an interpretation to carry an estate tail: but where the immediate devise is to one person *in esse*, and another not *in esse*, which can admit no such interpretation, all would have vested in those which were *in esse*; as in the case of a devise to a man and his wife, or to him and *primogenito filio*, having no wife or no son at that time; so that here if Elizabeth had any issue at the death of the devisor, if any estate in the rent by virtue of the will vested in those issues, the issues born after could not take; and the conusance would be naught, the title being made under Richard, who is averred to be one of the four children living at the death of Elizabeth. But it doth not appear, and therefore shall be taken against him that pleads it, that he was none of those who were born when the devisor died. (*c*) And it will not alter the case that the rent is to commence futurely; for if I devise a rent charge to the children of J. S., to commence after so many years, or after the death of A. and B., the rent vests only in those children who are then *in esse*; for the difference is between a grant or devise, and a limitation by way of use, *viz.* to the use of some *in esse*, and some not *in esse*. If I grant or devise to A., and his wife, that shall be, A. takes all; for he takes all at first, and his estate cannot be taken out of him. But in case of a feoffment to the use of a man and his wife that shall be, or *primogenito filio*, though he take all at first, yet the wife or son take after; not from or under him, but paramount from the estate which was

A grant or devise, and a limitation by way of use, differently construed. 17 Eliz. 340. 1 Co. 101.

(*c*) It shall be concluded that some were then born, and that he was not one of them. See below p. 397.

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35 H. 8. br. estate 75.

and still is by supposition, in the feoffees to serve that contingent use when it happens; for you shall not make fractions of estates, that an estate shall be settled in a man entirely by a devise, and after come to be divided again by a devise, more than by a common law conveyance. If I give lands to a man for his life, remainder to his first, second, and other sons, he having some *in esse*, the remainder to his heirs or heirs males of his body, the estate tail is executed, and the sons born after shall never take. *Home done terr. al baron et feme pour term de leur vies, et diutius eorum viventi rem. al hæred. de leur deux corps cest in estate tail executed ratione immediat. non obst. verbis statuti—quod voluntas donatoris in omnibus observetur.* So I think it is in case of a devise.—If a man devise land to a man for his life, remainder to his first and other sons, he having none *in esse*, the remainder to his heirs or heirs males of his body; the freehold is determined by the accession of the fee; and then the estates which were contingent to the sons shall not arise, for there was no particular estate to support them. And it is all one when the estate that should support the contingency determining by merger or surrender, as when it is destroyed by feoffment. Against this I confess there seems to be the opinion of Popham and Anderson upon a conference, 36 Eliz. —A devise was to Edward Cordall for life, remainder to his first and second, &c. sons in tail, remainder to the heirs of the body of Edward, who resolved that the estate was not executed for the possibility of the mean estate that might interpose; and, therefore, it was always disjoined during the life of Edward Cordall, so that of that estate his wife could not be endowed. Which opinion (with reverence to the justices) I conceive was not law; for even in case of *an use*, as it is resolved, 11 Co. 80, Bowle's case; a feoffment to the *use* of one for life, remainder to her first, second, and other sons, remainder to the heirs of his body, he is seised of an estate tail executed till the birth of a son, and then by operation of law the estates are divided: but if no son be born, he is seised of an estate tail, and then if the possession be not divided again by the birth of a son, he died seised of an estate tail; and so his wife shall be endowed; for an estate for life, and an immediate remainder of inheritance in the same person, cannot stand together: *vide* Litt. s. 525. and C. C. 299. a. b.; the case there put by my Lord Coke is—"A feme covert is tenant for life; and the reversioner confirms to the husband and wife, *habendum* to them and their heirs; they are joint tenants of the fee, and the husband seised in the right of the wife for her life; for the husband and wife cannot take by moieties during the coverture." And he cites 18 E. 3. 20. which doth not warrant his case, and it is ques-

3 Cro. 316. Contingent remainder destroyed by merger or surrender of particular estate as much as by a feoffment. 3 Cro. 315. Cordall's case *nemy ley*.

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tionable. But Littleton's case is good law: "where the wife is tenant for life, and the lessor confirms the estate to the husband and wife, *habendum* for their two lives, the wife shall hold it for life, and the husband shall have the land in remainder for his life;" for there is no alteration or enlarging of the wife's estate which she had before the confirmation. See the case of Buttinger, R. 59. Stephen's case, B. R., and after brought by error into the Exchequer Chamber, 16 Car. 2.

Limitations of estates to be construed in devises to agree with the rules in law as in deeds.

And I see no cause why we should vary from the rules of common law in such cases, but that limitations of estates should have the same construction in devises to agree with the rules in law as in deeds; as if I devise to one for life, remainder to the heirs males of his body, this is an estate tail executed, though it be in a will, as it would be in a deed. So if I devise to one for years, remainder to the right heirs of J. S., who is *in esse*, this is a void devise of a remainder, as it is a void limitation as a deed.

Limitationsof uses distinguished from devises.

So that, as I said, in case of a devise of a freehold, and an immediate estate of inheritance in the same person, cannot stand together; and if one be swallowed up by the other, they cannot be kept on foot, or disjoined again. But in case of a feoffment to uses, by the operation of law, though it be once executed, the estates shall cleave asunder when the son is born; for the old seisin of the feoffees supported it. But there is no such supposition in the case of a devise, to take that out of the devisee which was once vested in him; and, therefore, if a devise be to two, the one not *in esse*, the other shall take all; and it shall not result back to the other when he comes to be *in esse*, as it would in case of a conveyance to uses. And in case of an estate which takes effect *in futuro*, or by way of remainder, where the words may be otherwise supplied, those who are not *in esse* at the time of the etate limited shall not take. As in Frederick's case, Tr. 36 Eliz. C. B.—A fine was to the use of B. for life, and after to the use of the children of C. *procreat;* there were two children then born; they took presently; and, therefore, it was adjudged that the children after born took nothing in remainder. 3 Cro. 334.

So in the principal case here if any present interest passed by the devise of the rent to any of the children which were then *in esse*, when the devisor died, this conusance under Richard Mainwaring's title, who doth not appear to be one of them who were born in the devisor's lifetime, will not be good; it not appearing that there were no cildren born in the devisor's life; and, therefore, shall be taken strongest against the defendant, that there were such children born in his life, and living at the death of the devisor, and that Richard was none of them.

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In the next place, supposing Elizabeth had no children when the devisor died, but had all her children born afterwards; then, if the words of this devise shall be construed to intend a present devise, and not only an executory estate, there would be three things in the case against the defendant.

Dyer 304.

1. That it would be a void devise, because it intends a present interest where there is none *in esse* to take it;—that is the reason of the books of a devise to an infant *en ventre*. (*d*) If you take it as an *intended* present devise in interest, it is held to be void; for none is, to take it; and as there must be a grantee as well as a grantor, so there must be a devisee as well as a devisor of a rent or reversion. If I devise my reversion, or a rent *in esse*, to the children of J. S., who hath none at the time, it is a void devise. And so if I grant a rent *de novo* to the children of J. S., who hath then none *in esse*, to begin after J. S.'s death, it is a void grant; for a present interest was intended to pass.

2. If it should pass a present interest when the first contingency happens; that is, at the birth of any one issue, then it would vest in that first issue; and being settled, cannot be divested. There is no paramount estate or interest from which it can be drawn, and settle it in the rest.

30 Ass. pl. 47.
30 E. 3. 27.

Lands devisable were devised to Alice for life; and after her decease, that the lands should remain to Thomas for life, *ita quod* he do not alien—*quo minus propinquioribus hæredibus de sanguine puerorum prædicti H.* (the devisor) *post mortem prædicti Thomæ remanere debent.* The devisor had two sons and a daughter Margaret; and the daughter had children, not the sons, at the death of the devisor. And, because the sons and daughter could not take, for they are *pueri*, not *de sanguine puerorum*, the daughters of Margaret the daughter, born at the time of the devise, took by the remainder; and not the children of the sons born after the death of the devisor; for it was vested once in the others, who were born at the time of the death of the devisor, as a remainder.

3. Admit it should not vest in the issue first born, but in all the issues; yet if it vested in them as a present interest, during the life of Elizabeth their mother, this conusance would be naught; for, suppose there were six issues born, if every of them took as they were born, then the rent was to be divided into six parts; and when one of them died, that part ceased; and here is a conusance of a fourth part, whereas he avers that there were but four issues at the death of the mother, which may be true, and yet there might have been six issues born; and if all take as they are born, then the conusance should

(*d*) See Davy *v.* Kemp. in these Reports, p. 386. note (*c*).

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have been only for a sixth part; and every man's plea shall be taken strongest against himself; so that I hold, if this devise by H. Hodges, of a rent of 40*l.* were a present devise to any issue then born when the devisor died, or did come as a present interest to any issue of Elizabeth during her life, that then this conusance is naught.

Every man's plea shall be taken most strongly against himself.

But notwithstanding all this that I have said, in truth I hold this is but a contingent executory devise of a rent of 40*l.*; and is as much and no more than in effect, as if the testator had devised a rent of 40*l. per annum*, to commence after the death of Joyce and Elizabeth Mainwaring, and Edward Lively, to such issues of the said Elizabeth his daughter, as should be alive when the rent should commence. This construction makes a conformity between the law, and the intent and words of the devisor; which no other construction of the words will do:—

That construction shall be made which makes a conformity between the law and the intent and words of the devisor.

First, it is agreeable to the rule of law. I make no question but I may devise my land to such of my children or issue, as shall be living at the death of the survivor of A., B., and C.; this is an executory devise, and in the mean time it descends to my heir. So if A. devise, that whereas his wife is *enseint*, and that that child, when it comes to the age of twenty-one years, shall have such land, be the law as it will in the case of a *present* devise to an infant *en ventre*, (which I will not now dispute) this shall be a good *executory* devise.

Cases of executory devises.

And as much in effect was resolved in Bates and Amhurst's case, Mich. 15 Car. 2. (*e*) Norton devised all his lands in Kent and Surry to one of Nicholas Amhurst's daughters, that should marry with a Norton within fifteen years after his death; and appointed Nicholas Amhurst to receive the rents for the heir which should marry with a Norton. Elizabeth, the daughter of Amhurst, marries with a Norton. This was adjudged a good executory devise to Elizabeth; and yet there was at the time of the devise a double uncertainty;—an uncertainty of the person —which of the daughters?—and an uncertainty of the estate.

And as such an executory devise is good of land, so much more of a rent *de novo*, which even in a grant may be executory, and limited to begin *de futuro*, or after the death of another. It is true, such a rent may be executory, as to the estate, by way of grant, but not by way of grant to a person not certain, or *in esse*. But that is upon another reason, because there must be a present grantee as well as a grantor: but in case of an executory devise, it is sufficient there be a devisee when it comes to take effect. As if I devise that the first son which J. S. shall have shall have a rent of 40*l. per annum* during his life, this is clearly good as an executory devise; for an

An executory devise good, although subject to a double uncertainty.

The grant of a rent may be executory, and be limited to begin *in futuro*: but not to a person uncertain, or not *in esse*.

(*e*) See this case noticed in Mr. Fearne's Treatise, 533.

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executory devise doth in some respects resemble a contingent remainder; and as such a contingent remainder to one not *in esse* is good, if he be *in esse* at the time when the contingency happens, so it is an executory devise.

Resemblance of executory devises and contingent remainders.

Then for the devisor's intent,—it appears that when the rent commenced, he intended all the children of Elizabeth should take the rent as tenants in common; for the words are "equally to be divided." Then, as I have already shewed, this intent cannot take place if this rent should vest, either in the issues who were born before the devisor's death, or in any of the issues first born after his death, before the rent commenced in possession to exclude the others, born also before the rent commenced in possession.

If A. devise a rent to the children or issues of J. S., to commence after the death of J. S., I hold, if J. S. have any issues living at the time of the death of the devisor, only those children shall take, and not those after born; for there the intent of the will doth not appear to go further than a grant at common law; and so it would be in our case, if the rent had been devised to the issues at the time. But the rent here is devised to all the issues of Elizabeth "begotten and *to be* begotten, and equally;" whereby it is apparent the will intended a provision for those children after born, as well as for those who were then born. And this intent of the will cannot take effect but by making construction, that this is an executory devise; that the rent being to begin after the death of Elizabeth, all the issues which she shall then have shall have the rent equally; for, as I have shewed, if the rent vested before in interest, and did not depend in contingency, the issues born after the first vesting thereof could not take.

Devise construed to be executory to effectuate the intent.

In Wild's case it is said, "if a man devise lands to baron and feme, and after their decease to their children, or remainder to their children; although they have not at that time any child, yet every child which they shall have after may take by way of remainder." So are the words of the book; by which, I conceive, it is intended that all the children which they shall have when the remainder falls shall take, and in the mean time it is in contingency. In that case it seems to be implied by the word "although," and by the reason of the principal case there; and I think the law is the same if they have some children born at the time of the devise, and after have other children, all the children which they have at the time of the remainder falling, shall take; for the limitation is by way of remainder to the children, and not to take as immediate devisees. And if the remainder be in contingency till the death of the parents, the intent of the rule is performed, which would

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have all the children to take. And it is agreeable enough to the rule of law, that persons be *in esse* when the remainder falls. And it differs from Frederick's case of a feoffment to the use of A. for life, and after to the use of the children *de* C. *procreat.* which was by way of use, and not by way of devise; and not to the children indefinitely, but to the children *procreatis*; and it appears not that the remainder was intended to be in contingency, but to vest in those who were then born. But if it had been to the children of C. *procreat. et procreand.* I think it had been (though by way of use) a good contingent limitation, and the remainder would have been in contingency. And that is our case here, and much stronger; it being a will, and not a limitation of use.

It is sufficiently agreeable to the rule of law, that the persons (intended to take) be *in esse* when the remainder falls.

Construction of uses and devises.

The devise is to the issues "begotten and to be begotten" of the body of Elizabeth Mainwaring. The intent was apparent, that the children not born at the death of the devisor should take, as well as those who were then born. But then, as I have shewed before, none can take *in præsenti* till it be be known what children Elizabeth shall have; which cannot be known during her life. So that, whether Elizabeth Mainwaring had issue born before or after the death of the devisor, I think none shall take the rent but such as were living after her death; and then the averment that there were but four issues at her death, and the conusance under one of the four, is good; and so judgment ought to be for the defendant.

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BAINBRIDGE *v.* GARDINER (*a*).

(Where an estate tail was of the gift of the King, and the reversion granted out in fee, and re-conveyed to the Crown in fee, a recovery suffered by the tenant in tail barred the issue, notwithstanding the statute of 34 and 35 H. 8. c. 20. (*b*). The true construction of that act is,—heirs in tail are not bound by such recoveries only as shall be suffered by grantees in tail of the Crown, where the reversion *continued* in the Crown from the time of the original grant.
That the King is deceived in the granting of letters patent, how to be shewn.)

Note of a conference with the twelve Judges, upon a doubtful case.

Harg. MSS. No. 58. fol. 10.

This case of Bainbridge *v.* Gardiner was several times argued at the bar; and because it was a new case upon the statute, 34 H. 8. c. 20., and that one of the Justices did privately declare his opinion differing from the other three of us, who held for the plaintiff, we moved the Judges of the two other courts, that there might be an argument in it before us all, that we might receive their opinions in it; to which the Lord Chief Justice Hide, and the Chief Baron Hale, and the rest, agreed. And upon the first Monday in Easter term, 17 Car. 2., the case was argued before ten Judges, Justice Brown being absent upon occasion of his wife's death, and Baron Turner *propter ægritudinem*. And the case was argued by serjeant Waller for the plaintiff, and serjeant Glyn for the defendant; and afterwards the 27th day of April we debated the case amongst ourselves, and did all agree for the plaintiff, the Judge who was before of a contrary opinion submitting to us.

I shall shortly deliver the reasons of their opinions in those things wherein they agreed. Some other things, as concerning the fine by Philip Earl of Chesterfield, descent, warranty, &c. which were moved at the bar, were not debated, so as to grow to a resolution on them; and we agreeing unanimously in the main, there was no cause for it; and, therefore, I shall say nothing to them.

(*a*) "Adjudged 27 Maii, 17 Car. 2." MS. No. 58. fol. 9. Mr. Hargrave refers in this case, to Hardres, 409. T. Jones, 257., 11 Mod. 315. 2d ed.

(*b*) S. P. in Lord Nottingham's MSS. cited by Mr. Butler, Co. Litt. 372. b. note 322. Lord Nottingham seems also to have made his note on this case; see below, note (*f*).

There were two great questions made in this case:—the first and the chief point was, that this estate tail, being made of the gift of the King, and the reversion being granted out in fee, and then re-conveyed to the Crown in fee, and the reversion being in the King at the time of the fine levied by the issue in tail, whether the reversion, being resettled in the Crown, now reduceth the estate tail again, within the restraint of 34 H. 8.—That tenant in tail cannot bar his issue by fine or recovery.

Wherein the great objection is, that the words of the act are, "that no such recovery hereafter to be had of lands whereof the reversion, or remainder at the time of such recovery had, shall be in the King, shall bind or conclude the heirs in tail. But that after the death of every such tenant in tail, against whom any such recovery shall be had, the heir in tail may enter, &c. the said recovery, or any other thing or things hereafter to be had, done, or suffered by or against any such tenant in tail to the contrary, notwithstanding."

And this case is within the very words of the statute. The reversion is in the King at the time of this fine; and the statute saith not, that the reversion shall *continue* in the King in the same quality it was before; and, therefore, it is sufficient if the reversion be in the King at the time of the recovery, or other bar.

But all the Judges held that this case was out of the statute; and the issue in tail was barred notwithstanding the reversion was in the Crown. And they gave these two principal reasons:—

1st, That the tenant in tail was set free, and as it were emancipated, from the restraint set upon him by the act of 34 H. 8. At common law, (*c*) if the King had made a gift in tail before the stat. Westm. 2, the issue, *post prolem suscitatam, habuit potestatem alienandi*: vide 2 Cr. 454. 456. Lady Griffin and Stanhope's case. But this was restrained by that stat. of Westm. 2., not only in the case of the King, but of a common person: but then the statute of 4 H. 7. sets all loose again, and puts it in the power of tenant in tail by fine or recovery to bar his issue, though the reversion were in the Crown. And this power is not taken away by the statute of 32 H. 8. c. 36. of fines, as is agreed in Mackwilliam's case, Hobart, fol. 332, 333. And though this statute of 32 H. 8. by construction

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(*c*) "*Nota* at the common law, if the King grant lands in fee simple conditional, it was *doubted* if donee *post prolem suscitatam* might have aliened to bar his issue, Riley 438." Lord Nott. MSS. cited by Mr. Butler, Co. Litt. 372. b. n. 323.

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fetters not only the recovery, but also the fine by tenant in tail of the King's gift, (which my Lord Hobart in that case saith was by an oblique and indirect strain) yet the tenant in tail being freed from these great fetters by a grant of the reversion out of the Crown, there is no reason that he should be deprived of this freedom. And the construction ought to be made of the act that it intends by the reversion *being in* the Crown the reversion *continuing* in the Crown; which are the words sometimes used by my Lord Coke, C. C. 372, though in two other places there, commenting upon that statute 34 H. 8., and instancing some cases out of it, it is expressed "because the King had no reversion *at the time* of the recovery." And it is agreeable to the reason of law in like cases, where a privilege, or freedom from a servitude or restraint, is once totally acquired, it shall not be taken away by general words of a statute; or by the act of a third person to which the person who held the privilege or freedom is not consenting; and the words and intent of the act of 34 H. 8. are sufficiently answered by putting it out of the power of the tenant in tail (during the continuance of the reversion in the Crown *in statu quo*) to bar his issue.

Where a privilege or freedom from a restraint is once totally acquired, it shall not be taken away by general words of a statute; or by an act of a third person to which he who hath the privilege or freedom is not consenting.

And it was said that, whereas the statute of 21 Jac. c. 19. of bankrupt makes the estate tail liable whereof no reversion or remainder is or shall be in the King, his heirs or successors, of the gift or provision of the King, his progenitors, heirs or successors, that is to have no other construction, but that such entails as are within 34 H. 8. are out of the statute of 21 Jac.

And other cases may be put within the letter of the statute of 34 H. 8., which yet were out of the statute: as if there be tenant in tail of the King's gift, the King grants the reversion out of him, and then the grantee grants the reversion to the King for five years; this is within the letter of the act. The reversion then being in the King, yet it shall not hinder a common recovery. In that case the reversion was not in the King in the same manner as it was before; no more in the principal case; for now the King is in the *per* by the Lord Burleigh and Sir William Mildmay, and the tenure *in capite*, which is a great cause of the issues' "remembrance of the profit they have by the service of their ancestors done to the King," as the words are in the preamble of the act, is quite gone.

Argument *ab inconvenienti.*

2dly, The second reason upon which many of the Judges did principally rely was *ab inconvenienti*, the infinite mischief and trouble which might happen to purchasers if such revesting of reversions aliened out of the Crown might bring them within the danger of the statute. For when they find the reversion once taken absolutely out of the Crown they look no

further; and if they should, the reversions might be revested again in such manner as might not easily be found out; and the search and trouble to purchasers and others concerned to know whether the reversion was granted again to the Crown or not would be endless.

In Wiseman's case, 2 Co. 15. speaking of making intails, and granting the remainders to the Crown, it is said that by "secret and unknown limitations of the remainders to the King, purchasers are deceived, and the tenant in tail in possession is deprived of the power which the law gives him to dock the remainder;" and, therefore, excludes such estates tail with remainder in tail made by common persons out of the statute of 34 H. 8. The very same mischief (and upon the same reason) it is, to bring estates tail with reversions expectant, once taken out of the Crown, and then after regranted by the subject to the Crown, within the restraint of 34 H. 8.

The third reason is *ab authoritate*. It was said that the constant opinion hath been, that the reversion being once granted out of the Crown, the estate tail is absolutely freed, though the reversion be regranted; and so it was held by the Lord Chief Baron Davenport, in his reading upon this statute; and it was said that this very consequence was drawn by the advice of the said serjeant Davenport, George Croke, and Sir Thomas Crewe, Mr. Levins, who was then a barrister of five years' standing, drawing it according to their directions. And the current opinions have gone thus; and the common course hath been [when there hath been cause to take reversions out of the Crown for particular purposes, with intent, after these performed, to resettle the estate again as before,] to destroy the entail, and to take a new entail out of the Crown. And this two ways—

First, It hath been held, if the tenant in tail levy a fine, or suffer a recovery to the King, that this is out of the statute.

But, secondly, In most cases the reversion hath been put out of the Crown, and then the tenant in tail hath barred the entail; and when that which was intended by lease, jointure, &c. hath been let in, then to put the inheritance into the Crown, and to take the estate tail *de novo* out of the Crown.

In my Lord Baltimore's case, which concerned the Lord Arundel, which was remembered by divers of the Judges, there was an entail made out of the Crown to Baynton, and the reversion was taken out of the Crown, and the like recognizance as in our principal case; and the reversion being out of the Crown, a common recovery was suffered by the tenant in tail to the use of the recoverors, who regranted the land in tail, and then granted the reversion back to the Crown according to

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the condition. The question grew upon this second conveyance in tail, whether it was a provision of the Crown; and it was insisted upon that it must appear of record to be a provision of the Crown. But 15 Car. 1. B. R., Bramston, Jones, &c. being Justices, it was the opinion of the Court that it was matter of fact, whether it was an estate tail of the provision of the Crown, or not; and they left it to the Jury, who found it to be an entail of the provision of the Crown. And two more trials were after upon that point; all which went the same way, though it was strongly objected, that the new estate tail was drawn out of the first estate tail which was docked by the common recovery; and, secondly, that nothing appeared in the grant or patent, or otherwise of record, that this last intail was of the provision of the King.

But that case does not come to our principal case; for there was no interruption of the privity between the last tenant in tail, and the last reversion, admitting it to be of the provision of the Crown.

And Edgecombe's case, 16 & 17 Jac. was remembered. King Henry the Eighth gave lands to the Lord Lovell upon trust, to the intent to convey to Edgecombe in tail, with remainder to the Crown, which he did: but the deed was not inrolled, whereby the King did not take the remainder; and, therefore, it was agreed *de novo*, that a common recovery should be had, and that after the recovery the lands should be conveyed to Edgecombe in tail, with remainder to the Crown; which was done accordingly. The question there was, whether the first intention of making the first entail by the provision of the Crown, with remainder to the Crown, would serve to make the second entail and remainder to be of the provision of the Crown. But that case differs from our principal case as the Lord Baltimore's did.

The second point in this case was,—whether the recognizance, and the condition of it as they are here found, do difference this case from other cases, where the privity is gone, and the reversion is taken out of the Crown, and regranted. And it hath been strongly insisted upon, that it appears upon record that the intent of the Queen was, that no prejudice should come unto her, but only as to the letting in of the lease for sixty years, if it had been made by Sir Thomas Stanhope; and that, though the recognizance, &c. be a distinct record, yet all shall be taken but as one assurance; and the patent to the Lord Burleigh and Sir Walter Mildmay was *ad humilem petitionem* of Sir Thomas Stanhope, and so the tenant in tail still restrained by 34 H. 8. And it was further urged, that it is not a clear grant of the reversion out of the Crown, but a

kind of equitable right at least, and remedy for the Queen to have it again, which will preserve the incidents to it; as a bare right will support a contingent remainder, or a condition revest the reversion in the Crown, and leave the issue in tail in *statu quo prius*; which afterwards some of the Judges denied, and others affirmed in the case of a condition.

Secondly, It was urged, if this estate tail was left wholly free after the reversion revested in the Crown, that then the King was deceived in his grant of the reversion in fee to the Lords Burleigh and Mildmay, and so it is void. And it is not against law to couple and take in the consideration appearing upon another matter of record into the King's grant; and that no case can be put where it appears upon record that the King is deceived, that his grant shall be good; and they cited 17 E. 3. 59. (*d*) cited also 11 Co. 74. the case of the Friars Carmelites; who to avoid the Statute of Mortmain, and to extinguish the mesne seigniories, procured a feoffment to the King, and letters patent from the King to themselves; and though the cosin and fraud was not contained in the grant made to the King, but appeared only by averment *dehors*, yet the charter was adjudged (upon a *scire facias* in the Chancery) to be repealed. And in Sir Hugh Cholmley's case, the Court takes notice of frauds apparent without the finding of the Jury; and in our principal case, if the issue take advantage of this grant out of the Crown (intended only for levying a fine for years *sur conecssit*) it is a kind of fraud.

But all the Judges here held, that upon this recognizance, and the condition of it, it appears the Queen only intended to prevent prejudice to her own reversion, which, by a common recovery whilst the estate was in the Lord Burleigh and Sir Walter Mildmay, would have been gone: but did not look to prevent the predjuice to the issue, but the contrary; for the Queen gave way to a lease for sixty years, to begin after Sir Thomas Stanhope's death. And upon that lease only 15*l.* 5*s.* 8*d.* rent is reserved, whereas the rent payable over to the Crown is above 100*l.* And they resolved that the recognizance makes no alteration in this principal case:—

First, For that it provides only for the Queen's reversion:—

Secondly, The recognizance was a collateral thing out of the patent, and operates not upon it, being another conveyance: but the Queen rested upon her security if any thing had been to her hurt; and the case of 17 E. 3. 59. (*d*) as I think, proves not that which is inferred, that the King's grant may

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(*d*) Qy. 58.

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be avoided by taking in matters collateral, or *dehors*, generally. The principal case there is good law; *vix.* that a grant was made to the King to the intent that he should grant to the Friars Carmelites in mortmain, and so to destroy the seigniory of the bishop of Winchester, of whom the lands were holden; and the King granted in mortmain accordingly; the King's charter was repealed by *scire facias* for this fraud. But this doth not appear to be made void by the reason, or rule of the common law, as my Lord Coke said: but it was by the Statute of Mortmain, 7 Ed. 1.—"That no person, *arte vel injurio*, shall offend against that statute," which words are twice repeated there—and gives power to the chief lords to enter. And in the case, 21 E. 3. 46. the case of the Master and Scholars ofMerton, after the King was petitioned, as he must where an estate was made to him, they entered in such case, and the entry was adjudged good:—and 5 R. 2. pl. 2. No. 92, there was a petition of the commons that a religious person procured others to infeoff the King, and the King to grant in mortmain to hold of the King, and to extinguish the seigniories. It was answered that if such feoffment were made without the assent of the lords mediate that they may enter, as in the Statute *de Religiosis*: but if a grant were made to the King, to the intent that the King would grant (to hold of himself) to J. S., a single person, though cosin is a thing averable and odious in law, and may be pleaded, yet, without alleging express cosin, nay, perhaps though it were alleged, the charter would not be repealed. In Alton Wood's case, the fourth exception, 43. b., to letters patent was, that the King granted in consideration of the surrender of letters patent, where, in truth, the estate, it being in a feme covert, could not be surrendered; and so the King being deceived in his consideration, the patent was void. But it was overruled; for it did not appear by any express matter in the letters patent, that the King intended a surrender of the former estates, but of the letters patent, whereby those former estates were granted; and *the book* (*e*) gives it for a rule, that "it would be dangerous to make the King's grants void by construction upon inferences and arguments without direct and express matter contained in the letters patent." And in Doddington's case, 2 Co. 34., the Judges would take no notice of the auditors particular; for they said they ought to found their judgments upon the patents themselves. And in our principal case there is nothing in the patent itself to the

(*e*) The words *the book* are not in the manuscript.

Lord Burleigh and Sir Walter Mildmay out of which it can be inferred that the King's intention was, that the issue in tail should not be prejudiced after that grant made to them.

A third point was argued, whether the fine by Philip Stanhope, being issue in tail, in the life of the tenant in tail (and so not within the express words of the statute, which are, *of things done and suffered by tenant in tail)* bar those who are his issue.

This was not much spoken to: but divers of the Judges held it did not, and also denied the law to be according to Stratford and Dover's case, (*f*) C. C. 373., where the disseisor of tenant in tail, the reversion in the Crown, levies a fine, and five years pass, whether it shall bind the issue in tail; which case is also cited by Justice Jones in Stone and Newman's case: but they resolved nothing as to this point, having given their opinion so fully on the first point.

(*f*) "It seems to some that the case of Stratford and Dover above quoted is not law; for in 2 Rep. 11. Magd. Coll. case, it is adjudged that the fine does not bar the college, not being parties, because the 13 Eliz. makes void all acts which it suffers; and such sufferance extends to the act in which they were not parties, by Sir Orlando Bridgman." Lord Nottingham's MSS. cited by Mr. Butler in note 325. Co. Litt. 373. a.

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COLLINGWOOD *v.* PACE (*a*).

(Devise to the heir of N. and to the heirs of the said heir for ever, held to be void, as N. was living at the decease of the testator (*b*).)

Harg. MSS. No. 55. fol. 52. In the Court of Common Pleas.

This term (*c*) the great case of Collingwood and Pace was argued by the Judges, who were divided in opinion in it. Browne and Hide for the plaintiff,—That two brethren, being naturalized several, the issue of one might inherit to the other. See the reasons at large in my argument (*d*).

But we all agreed in this point:—Sir John Ramsey, being seised in fee of the rectory of Kingston, in reversion, expectant upon an estate limited to his wife for her life, and having a brother Nicholas, who was an alien, but had issue, Patrick, his only son, born in England: and Sir John, having by his will, made 6 Jac., devised that his executors should pay to Nicholas 100*l.* *per annum* for forty years, if he live so long, towards the maintenance and bringing up of his eldest son, de-

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(*a*) Mr. Hargrave's note on this case in No. 55. fol. 52. is as follows: "In Vol. III. of these Manuscripts, fol. 56. to 78., Lord Bridgman's argument in C. B. is given, and S. C. in C. B. 1 Keb. 65. and 1 Sid. 193. S. C. in the Exchequer Chamber, Vol. II. of these Reports, 81 to 109. Lord Bridgman's argument; fol. 110. to 113., Judge Windham's argument; and fol. 114 to 122. Lord Hale's, but the last only as in 1 Ventris, 413, S. C. in the Exchequer Chamber, 1 Sid. 193., Hardres, 224., 1 Keble, 174, 206, 265, 535, 579, 585, 603, 670, and 699." Upon the division of the Judges in the Common Pleas, the opinion of the Exchequer Chamber were taken, where this copious argument seems to have been delivered; see 1 Keb. 699. It was held by Hale, C. B., and by six other Judges, against the opinions of Sir Orlando Bridgman and of two other Judges, that the plaintiff, a native-born son, of a naturalized son of an alien not naturalized, should inherit to another naturalized son of the alien.

(*b*) The point on the will was determined in the time of the Commonwealth, in another case; see 2 Sid. 26. 50. and 148.

(*c*) "Tr. 13 Car. 2." Harg. MSS. No. 55. fol. 52.

(*d*) The argument at large, is in No. 57. fol. 56. of Mr. Hargrave's collection. So much only of it is printed here as relates to the point on the construction of the will upon which the Court agreed. That part of it which related to the point adjourned to the Exchequer Chamber is probably better stated in the argument of Sir Orlando Bridgman there; and it is printed at length from No. 56. fol. 81. of the manuscript, in p. 414. of this volume.

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viseth in these words:—"*Item*, I give and bequeath unto the heir of my brother Nicholas Ramsey, and to the heirs of the said heir for ever, all that manor and parsonage of Kingston, upon the trust and confidence that the said heir and heirs shall from time to time pay and discharge all the debts and specialties which I owe and am chargeable withal, excepting such debts which are mentioned in a schedule hereunto annexed;" —and dies within a fortnight, Nicholas and Patrick being both living.

I conceive this devise is void. In Wild's case, 6 Co. 16. [land was devised to A. for life, remainder to B. in tail, remainder to Rowland Wyld and his wife; and after their decesses to their children, they having then a son and a daughter. The question was, whether Rowland and his wife had an estate tail or for life, with remainder to their children for life;] which case was argued before all the Judges of England. The Judges first considered the judgment of the common law, if the conveyance had been made by the devisor in his life: and, secondly, what reason there was why the judgment should not be according to the rule of law. No reason, as it is there said, can be given, but the intent of the testator: but that intent must be manifest and certain, not obscure and doubtful. Hobart, 225., Ann Needler's case makes a difference in the King's grants between the intent mental, and the express intent legal.] That rule is also laid in Counden's case, Hobart, 32.—That the devise must be taken according to the intent of the devisor: but that intent must be so expressed in the will written, that it may be certain to the court, and not against law. Now it is clear by a conveyance at the common law, an immediate estate limited to the heir of Nicholas was void, and could convey nothing to Patrick.

No. 57. fol. 76. (*e*).

The intent of a testator must be manifest and certain, not obscure and doubtful.

First, because he was an alien;—secondly, because his father was alive, and so he was no heir.

Then for the intent it is to be agreed here, that when the Earl devised "to the heir of his brother Nicholas," that by the word *heir* he intended to design some person certain, and that it shall not be taken to be a word of limitation of estate;—the rather also because it is a devise to the heir, *and the heirs of that heir*, so that the latter words only are the words of limitation; and, therefore, I conceive the principal case in Counden's case, and Ashenhurst's case, come not home, nor are any authority to guide this case; for the devise to the *heirs*

"Heir" construed as a designation of a person certain; and not as a word of limitations of an estate.

(*e*) This is the "argument at large," of Sir Orlando Bridgman on the construction of the will; and delivered in the Common Pleas, in Tr. Term, 13 Car. 2.

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male, or *right heirs male*, there amount not only to describe the person, but also to limit the estate; and there be probable grounds to conjecture he intended Patrick to be the devisee, because the devise was to take effect immediately after his death, and during the life of Nicholas; for there was an express devise to Nicholas by the will, and, therefore, he could not intend *a legal heir*, but *heir* according to the vulgar acceptation of the word. And possibly he might not know the Christian name of Patrick, for it appears by the will he knew not the Christian names of his brethren-in-law who married his sisters.

Indicia of a testator's intention.

But we are to expound wills, not to make them; and where the intent appears not clearly and demonstratively otherwise, we are to judge the words of a will according to the construction of law upon such words in a deed.

Where the intent of a testator appears not clear, we are to judge the words of his will, according to the construction of law upon such words in a deed.

It is not clear he intended it to Patrick particularly; for then, if Patrick had died before him, Patrick's son William should not take, nor any other son of Nicholas, whereas by his will he intended the heir of Nicholas should take, and his heirs.

Secondly, It is not clear he intended the eldest son of Nicholas at the time of the devise; for, if he had, he might have named him, as he did in the other part of the will name the eldest son of Nicholas.

Thirdly, possibly he might intend only a legal heir who might take, and transmit it to his heirs collateral, which could not be here if Patrick took; and might conceive that Nicholas, his children being *post nati*, were capable as heirs, and, therefore, might devise it so, and not know the force of law, that there cannot be *hæres viventis*; and possibly in regard the countess his wife had an estate for her life, he might imagine the devise could not take effect till after her death (and a remainder may be limited to one not capable) and, before her death, Nicholas might be naturalized. Every one of these may be conjectured as well as any one of them; there is no clear certainty of his intent in the will. [If the devise here had been to the heirs of J. E., an Englishman, and he outlived the devisor, I take it somewhat a strong case the devise should be void; for there was a possibility it might have been good in a legal sense. The case of an alien makes, indeed a difference. But it appears not by the will that Nicholas was an alien, nor doth it appear he took that into consideration. Perhaps he did not,—and what ground have we to suppose it?]

And, therefore, having chosen such a description of the person to whom he deviseth, as requires the law to ascertain it, that devise must fall within the legal acceptation, and be

legal heir, or otherwise he takes not. And I hold it a good rule in case of wills,—that the intention to pass an inheritance to any person, contrary to the words of the will, or rule of law, must not only appear within the will itself, but must be so expressed that it be certain to the court, which it is not in this case.

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Implication against the words of a will, or an intention against a rule of law, must be so expressed, that it be certain to the Court.

And it is a good marginal note in Hobart, 33. in Cambden's case:—"No man shall shew me a case in law, where by purchase, by a devise to an heir, any may take that is not heir indeed, without declaration plain." That case is put of the heir of the devisor: but the reason is the same where the same expression is used in a will concerning the heir of another.

Dictum recognized, that a devisor may make his own heir take by purchase, by a plain declaration in the will.

A great objection hath been made,—that construction ought to be made *ut res valeat;* and by this construction the will is void in its first creation; for, first, Nicholas being an alien, he could have no heir;—secondly, that he could not be *hæres viventis*. I answer, it is true that the law is, that an alien can have no heir, and that one cannot be his father's heir in *vitâ patris*. But if this objection have any force, it must be supposed that the devisor was a lawyer, whereas the law supposes him *inops consilii*, and the question is not, what the operation of law is upon the devise, but what he intended by it. And his intention must be gathered by his words, and his words construed according the letter and legal propriety of them, where nothing appears to the contrary; and it not being *found* that Patrick was reputed heir, or known by the name of heir of Nicholas in Nicholas his life-time, which is matter of fact; I conceive the words in the will shall have such interpretation as they should have had in a grant or conveyance at the common law, and no other; and, consequently, that the devise cannot be good; because Nicholas had no heir at the time of the death of the devisor, no more than a devise to a corporation not founded, or a person *not in esse*, Hobart, 33.; 9 H. 6. 23.; and Hobart, 33. Counden's case.

The question upon a devise is not what the operation of law is upon the words, but what the testator intended by it. The intention must be gathered from the words of a testator, and the words construed according to the letter and legal propriety of them, *where nothing appears to the contrary.*

And for express authority in this case, besides the judgment of the Court heretofore in this very point, I know the opinion of my Lord Bramston, Justice Bacon, and some other very learned persons now living, did in the point fully concur therein.

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Harg. MSS. No. 56. fol. 81.

In the Exchequer Chamber (*f*).

(Construction of acts of naturalization.)

BRIDGMAN, C. J.

Gawen Collingwood brought an action of trespass and ejectment against Perses Pace; and declares that John Ramsey, the 20th of July 1656, at Kingston-upon-Thames, did demise to him one messuage, one garden, 500 acres of land, 500 acres of meadow, and 500 acres of pasture, with the appurtenances in Kingston, and the rectory of the church there, from 1st June then last past, for seven years; by virtue whereof the plaintiff entered, and was thereof possessed till the defendant, the said 20th day of July, did him eject, to his damage, &c. And upon not guilty pleaded, there is a special verdict found:—

That as to all the tenements aforesaid, besides the said rectory, the Jury find the defendant "Not guilty."

But as to the rectory, they say, that one Robert Ramsey, an alien, born of Scottish parents in Scotland, and a subject of the King of Scotland, before the accession of the Crown of Scotland to the Crown of England, has four sons, *viz.* Robert, the first born son, Nicholas, the second, John, his third, and George his fourth, all aliens born.

That Robert, the first son, had issue three daughters; Margaret, Isabel, and Jennet, all aliens born, yet living.

And that Nicholas, the second son, had issue of his body, Patrick, born in England, at Kingston aforesaid, 31st May, 1618; and that Patrick had issue William, born in England, &c. yet living.

And that the said John, who was afterwards Earl of Holderness, naturalized by act of parliament, begun 19 Martii, 1 Jac.; and find the act *in hæc verba:* which is to this effect:—

In some acts of naturalization, children are not mentioned. An act before one made 5 Geo. 3. and naturalizing Anthony Sapte and Francis Sapte, his brother, makes no mention of the children of either (*g*).

That he and his children to be born be natural subjects, and be adjudged and taken in every respect, condition, and degree, and to all intents and purposes, the King's natural liege subjects of this realm; and as free to all intents, constructions, and purposes, as if they had been born within this realm. 2. And shall

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(*f*) "7 *Maii* 1664, 16 Car. 2." Harg. MSS. No. 56. fol. 81.

(*g*) Note by Mr. Hargrave.

be enabled and adjudged able, to all intents, constructions, and purposes, to demand, have, and enjoy, any manors, lands, and tenements; and to make their resort, and pedigree to any of their ancestors lineal and collateral, by reason of any descent, remainder, or any other title, which shall descend or grow unto them; as also to prosecute suits, and other lawful things whatsoever, to do as lawfully, frankly, fully, liberally, sure, and freely, as if they had been born in England, and as other persons here may do.

And further find, that the said George was also naturalized by a like act of parliament, in 7 Jac., and find the act *in hæc verba* also; and that the said George had issue, John, the lessor of the plaintiff, his eldest son born in England, &c.

And find, that John, Earl of Holderness, was seised in fee of the rectory in question, held of the King, as of his manor of East Greenwich, in socage; and conveyed it to the use of himself for life, the remainder to Martha his wife for life, the remainder to his own right heirs; and find the will *in hæc verba*; and that the Earl, the 24th of January, 1 Car., died without issue, and that the said Martha survived him, and entered into the rectory, and married the Lord Willoughby.

And find, that 10 July, 1636, George died, having issue the said John, the lessor of the plaintiff.

And that Nicholas, *ult. Maii*, 1638, died, leaving the said Patrick, his only son, living.

And that, 29 Feb. 10 Car., an inquisition under the great seal was taken at in Surrey; by which it was found that the Earl died without issue, and without heir, whereby the said rectory escheated to the King; and find, that, Oct. 25, 10 Car., the King did, by his letters patents, &c. grant the said rectory to William Murray, and his heirs; and the reversion thereof, &c.

And find, that the said Lord Willoughby, and Martha his wife, William Murray, and Patrick, after the death of Nicholas, did grant their estates in the said rectory to the Earl of Elgin and Edward Sydnam, and their heirs.

And that Martha, 6 *Junii*, 1641, died.

And that John, the lessor of the plaintiff, *ult. Junii*, 1642, entered into the rectory, and was thereof seised, *prout lex postulat*, and being so seised, made the

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lease to the plaintiff, who entered; upon whom the defendant, as servant to the Lord Elgin and Sydnam, and, by their command, entered. But, whether guilty or not, the Jury pray the advice of the Court, &c.

Upon this record the case, in effect, and as to the matter for which it was adjourned hither, is this;—Robert Ramsey, an alien, born in Scotland before the accession of the Crown of England to King James, had issue sons, aliens, Robert, Nicholas, John, afterwards Earl of Holderness, and naturalized by act of Parliament, 1 Jac., and George, naturalized by act of Parliament, 7 Jac., who afterwards had issue John, the plaintiff's lessor, born in England; Nicholas had issue Patrick, born in England, 1618, who had issue William, born in England, and yet living.

John, the Earl, having purchased the rectory of Kingston in question, died seised thereof without issue; Nicholas dies, George dies, John, the lessor of the plaintiff, being his son and heir.

The question is, whether John, the lessor of the plaintiff, the son of George, the heir, by descent, to the Earl his uncle; or that, for want of an heir, the rectory shall escheat unto the King, of whom it is holden.

To make this not to be the case upon the verdict, one objection was made by my brother (*h*), who first argued for the plaintiff. That it is expressly found that Robert, the father, was born of alien parents, and that he had issue four sons, aliens: but it is not found that their mother was an alien, and therefore she shall be intended an Englishwoman; and so, without question, by her line, John and George, the two brethren, were inheritable one to the other.

But this hath already received a full answer. Her husband appears upon record to be born out of the King's allegiance, and to have had all his sons there; she shall be presumed a native where her husband lived, and had issue, unless the contrary had been expressly found. To which I shall add, that this was not the point argued at the bar, for difficulty whereof the case was adjourned. That *in rei veritate*, the mother was also *antenata* in Scotland, and so the matter itself fit to receive the determination of this Court, whereas it hath been agreed by all that have argued this case,—1st, That

A wife shall be presumed a native where her husband lived and had issue, unless the contrary be expressly found by the record (*i*).

(*h*) Windham, J. 1 Keble, 581. and Harg. MSS. 56. fol. 114.

(*i*) To this Sir Matthew Hale agreed, against the opinion of other Judges, who gave judgment for the plaintiff, 1 Ventris, 422.; 1 Keble, 671.

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neither the daughters of Robert, the son of Robert, being aliens, nor Patrick, the son of Nicholas, though born in England, can inherit, because his father was an alien, though descended from the elder brethren of John the Earl.

And, 2dly, That as the estate cannot descend to them, so neither do any of them stand in the way to hinder the descent to George. The difference hath been often put, out of our books, between the case of a son or brother, aliens, who are in law as *non existentes*, and the brother or son of a person attainted as to this point (*k*).

And, 3dly, That there is no difference between the descent to George, and the descent to John his son, the plaintiff, who, *jure representationis*, is the same with his father.

So that now the point of the case is come to this: John Ramsay, and George Ramsay, two brothers, of alien parents, are naturalized by two several acts of parliament,—the one purchaseth land, and dies; whether the lands shall descend to the other.

And as to the point of descents, there will not be, though in some other respect there may be, an essential difference between the two sons of an alien born in England, and the two sons of an alien who are naturalized, and so had a civil birth here; and so the point of the case will come to be the same in effect with that put by my Lord Coke, and wherein he hath delivered his opinion negatively. An alien cometh into England, and hath issue two sons; one of them purchases lands, and dies: whether the other of them shall be his heir. I say it will come to be the same point in effect, unless there be something especial in the penning of these acts of naturalization of John and George Ramsay to alter the case, which I

Where an estate cannot descend to the eldest of several sons or brothers, he being an alien, this shall not hinder the descent to the younger sons or brothers, if enabled to take; otherwise, if he had been attainted. Dr. and St. 23. Br. deniz. 7. 42 E. 3. 2. C. C. 8. 31 E. 3. Cosenage, 5.

(*k*) Lord Hale's statement of this point is in 1 Ventris, 417. where, in Mr. Hargrave's copy, in the British Museum, the following note is preserved:

"Acc. Cro. Jac. 539. Co. Litt. 8. a. D. and S. dial. 1. C. 1. fol. 13. a. of old editions, are all with Lord Hale in the difference; and Lord Bridgman, in his manuscript note of his own argument in Collingwood *v.* Pace, though differing with Lord Hale on the other points, agreed clearly on this head. Indeed, the Year Book of 22 H. 6. 33. is contrary, and is so abridged in Bro. Deniz. 14. But Brook cites against the Year Book, Doctor and Student; and seemingly with approbation. He also cites the same doctrine from Doctor and Student, in tit. Descent, pl. 57. It is observable also that in a Scotch appeal of Count Leslie *v.* Grant, before the Lords, in 1763, the case of the respondents treats the doctrine as unquestionable both in respect to our law and the law of France. And Mr. Charles Yorke was one of the counsel for respondents, and as such signed the case on his side."

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conceive, with my two brothers that argued last, that there is not; of which I shall speak anon.

I hold, that if husband and wife, aliens, have two sons naturalized, or born in England; and one of the sons purchaseth lands, and dies; the other brother shall not be his heir. And I take the reason and the rule for it set down by my Lord Coke to be good; *viz.* for there never was any inheritable blood between the parents and them; and where the sons by no possibility can be heir to one of the parents, the one of them shall not be heir to the other.

If husband and wife, aliens, have two sons naturalized, or born in England, and one of the sons purchaseth lands, and dies, the other brother shall not be his heir. C. C. 8.

In the discussing of this point some who have gone before me, and held the contrary, have laid down some things as preliminaries, or grounds, to the reasons of their opinions; which, for the true stating of the case, and shewing wherein we differ, it will be necessary to consider.

Some things have been observed concerning descents; some things touching aliens, or alienship; some things of naturalizations; and some things will be fit to be premised concerning natural and civil blood.

On the doctrine of descents.

For descents, whether collateral or lineal, they have been divided into two sorts; into immediate descents, as in lineal from father to son; and in collateral from brother to brother: and mediate descents, as in lineals from grandfather to grandson (the father dying in the life of the grandfather) where the father is *medium deferens* of the descent; collaterals, as from the uncle to the nephew, or the nephew to the uncle.

And it hath been inferred that in immediate descents there can be no impediment but what ariseth in the parties themselves. But in mediate descents it is agreed the disability of being an alien, or attainted, in him that is the *medius antecessor*, will disable the other, though he have no such disability: and, therefore, Patrick here, though born in England, cannot inherit to John his uncle, nor John to him by reason of the disability of Nicholas the *medius antecessor*: but it is said that the descent from brother to brother, though it be a collateral descent, yet it is an immediate descent; and so no impediment in another ancestor would hinder a descent between them.

To this I answer, and it is not denied me, that in propriety of speech a descent is called mediate or immediate, not in respect of the mediateness or immediateness of the pedigree, or degrees of consanguinity; but in respect of the mediate or immediate descent of the estate or right; and, therefore, a descent from the grandfather, who died in possession, to the grandchild (the father being then dead,) or from the uncle to the nephew (the brother being then dead,) is in law an immediate descent as well as from brother to brother; and he is in the

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per, and not in the *per* and *cui*. I have not known in my own observation that the distinction of mediate and immediate descent hath been otherwise applied in law.

But if, as it hath been explained, by immediate or mediate descent they mean only the mediateness or immediateness in respect of the line or pedigree, and so, by an ancestor whom they call *medium deferens*, intend *medium deferens sanguinem* only, whether *civilem* or *naturalem*; then, he is an immediate ancestor from whom the other derives his blood immediately, and he is a mediate ancestor from whom the kindred is derived *mediante altero*. And then as to natural blood, it is *oppositum in objectum*, to say, that there is an immediate descent between brother and brother in the collateral line; for the brother is of kindred to his brother by the common stock of the father, and not otherwise. And as to civil blood, we say, that the consanguinity between brother and brother, as in the natural course, so in the civil or hereditary course, it must be considered as derived *mediante patre*, though in pleading it be not mentioned. And that, therefore, the capacity or incapacity of the father influences or affects both the sons as to hereditary descents; and so this division of descents into mediate or immediate in the collateral line is no more but to say, that brother may inherit brother without having respect to the qualification of the father, which is the thing in question; and being denied by us who argue for the defendant, rests *ad probandum*. And I shall consider the proofs of it anon: but in the mean time it is of itself no foundation for a superstructure.

The next consideration is concerning aliens, or alienship; and the influence it hath upon persons born in England of alien parents; upon denizens; and persons naturalized. It must be agreed that the law, which is the rule of descents in England, is also the measure of the incapacity of an alien, and he only rule which must determine how far it extends in cases of nheritances; (for with other cases we have now nothing to do.)

It is said that there is in an alien a disability personal, or riginal in the alien himself; or a consequential or consecuive disability that reflects from an alien to one that must deive by or through him, as in our principal case. Nicholas eing an alien, there is a consequential impediment derived pon Patrick, though born in England, whereby he is disabled o inherit John his uncle; which disability they make parallel o the corruption of blood, which is the consequent of an atainder.

This requires some farther explication:—first, I say, the inapacity of an alien is not properly termed a disability, but a on-ability; and, therefore, hath a nearer resemblance to a

The incapacity of an alien is not properly

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bar, as is in Edwards and Roger's case, (*l*) than to an attainder; of which distinction I shall have occasion hereafter to make use.

termed a disability, but a non-ability.

Next, though the distinction between disability personal, and consequential or consecutive, as it is termed, may in some cases hold; yet it is not large enough for our case: for upon that distinction the disability is made to be fixed, and to move only from the alien.

But the defect, or inability, or incapacity, in our case looks not upon the alien alone, but upon the son of the alien, from whom his brother claims; for the right of descent, or *jus consanguinitatis*, whereby one inherits to another, hath an aspect as well *ad terminum a quo*, the person from whom it descends, or is derived, as *ad terminum ad quem*, the person to whom it is descended or derived.

In descents the law requires a capacity in him from whom the land moves, as well as a capacity in the person who is to take an estate by hereditary descent.

And, therefore, in the cases of hereditary blood, or right of descent, the law requires a capacity or ability in him who is *terminus a quo*, from whom it moves, as well as a capacity or ability in the person who is *terminus ad quem*, to take an estate by hereditary descent; just as in all cases of donation the donor must be a person capable to give or communicate, as well as the donee to receive or partake; and the defect of capacity to transmit in the person of the transmittor is equally an impediment to transfer, as the defect of him to whom it should be transmitted is to take.

For instance; an Englishman hath a son, alien, born beyond the seas, and hath divers other sons born in England; the alien son is made denizen by letters patent. Those sons who are here born have a capacity to take, as well in the collateral line as lineal, from any ancestor: but the son who is made a denizen hath an ability only to transmit an hereditary blood in the direct line; and, therefore, the other brothers shall not take as heirs to him; not in respect of any defect in themselves, but for want of power in their denizen brother to transmit a right of descent of hereditary consanguinity.

To apply it to our case.—John, Earl of Holderness, when he was an alien, had a total inability or incapacity to retain an estate to himself, or to transmit any hereditary right, either in lineal or collateral line. The act of naturalization cures the two first impediments, that is, the incapacity to retain an estate to himself, and the incapacity to remit it to his issue: but, as I shall endeavour to shew, leaves the incapacity to remit a right of descent, or *jus civile consanguinitatis*, to any of the collateral line, as it was before. So we that are for the defendant plead

(*l*) W. Jones 456; S. C. Cro. Car. 524—543; March 74. And see Godfrey v. Wade, W. Jones 31. F. H.

an impediment, as well in the person of John, Earl of Holderness the purchaser to transmit an estate to his brother, as in the person of George the brother, who should take by descent, and fix it not only in their alien parent.

Construction of acts of naturalization.

And this brings me to the third thing; that is, the consideration of naturalizations. What retrospect either of these acts of naturalization may have, and how far the words, as they are penned, invest a power or right in John or George, beyond what they would have had if they had been born in England, hath been spoken to already; and I shall have occasion to touch it further anon.

Distinction between aliens of an English extraction, and aliens of a foreign extraction.

But now, consider what capacity the acts of naturalization give to John and George, and when it leaves them *in statu primitivo*; and for the explication of this I must again distinguish between aliens of an English extraction, and aliens of a foreign extraction.

If an Englishman have an alien son, born beyond sea; if this son be naturalized, he is now engrafted into the common stock by the act of naturalization, and communicates and receives sap and influence from the root. There is now one *commune vinculum*, a common ancestor, from whom and to whom there is a resort. But if an alien, not of English but foreign extraction, be naturalized, the case is otherwise. He cannot be set upon an old stock: but is a new plant, which communicates to none but to its own branches.

The words are the same in both acts; "that he and his children, lawfully to be begotten, shall be his majesty's liege people, and natural subjects of this realm of England." And I may suppose in the act of naturalization of George Ramsey, wherein some others are also naturalized, some of them may have been of English extraction: but, *ratione subjecti*, on the person naturalized the inference or operation of the act is differing between the one and the other; as the poet said, *Limus ut, hic durescit, et hæc, ut cera, liquescit, uno eodemque igne:* the heat of the fire is the same, though it have a contrary influence upon the clay, and the wax; to harden the one, and to soften the other.

If father and son be aliens, and the son is naturalized generally, his uncle an Englishman shall not inherit his nephew: but if the father had been born in England, or naturalized, and of English extraction, then the uncle would have inherited.

It hath been agreed, if the father and son be aliens, and the son is naturalized by such an act as ours is, his uncle, an Englishman, shall not inherit his nephew: but if the father had been born in England, or naturalized, and of English extraction, then the uncle would have inherited him, which proves the difference, so far as I have urged it, that the same words

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in the act of naturalization, in respect of the several qualifications of the persons naturalized, may have a several operation.

Whether they have so as to the collateral descent, between brother and brother, is the matter in question; and I shall endeavour to prove that they have.

The same words in an act of naturalization may have a several operation in respect of the several qualifications of the person naturalized: *viz.* one operation, if the person naturalized were of alien extraction, and another if of English extraction.

The words indeed of the act of naturalization of John Ramsay are, *that he shall be as if he were born in England*, but that must be understood according to the measure of his capacity, whether of English or foreign extraction: but must be understood, *as if he were born in England of* FOREIGN PARENTS. For a Frenchman, though naturalized, is a Frenchman still, and *ad fidem regis Franciæ;* and if there be a difference between the two crowns, the allegiance and obligation to the French crown, preceding in nature, and order of time, prevail over the later to the English crown.

And I further observe upon the words of this act of naturalization, that it is apparent that the intent of it was, to provide only for the issues of the body of John, and not for the brethren, or other collateral heirs; for the words are, *That he and his children by him, thereafter to be begotten,* (not his brethren or heirs) *shall be his Majesty's liege people and natural subjects; and shall be taken as natural and liege subjects as if he and they were born in England.* And though there is a clause in it that gives power to him and his children, to make resort and pedigree, as heir to any of his or their ancestors lineal or collateral, I say where the persons naturalized are of English extraction, and would have had such ancestors if they had been born here, it is an effectual clause: but it makes no ancestors, where the law made none before. And the words are but as the clerk's forms; for it is a sufficient act of naturalization to enact, *that John shall be adjudged his Majesty's liege and natural subject*, without any other words; and in the printed report of Godfrey and Dixon's case, 2 Cr. 539., it is so agreed; and that all the other words are but *ex abundanti.* But still the words shew the intent was to provide for the lineal heir, the issues of the body of John, and not the collateral; and (as I shall have occasion to shew anon) there ought to be a strict and not a favourable construction of acts of naturalization.

It is a sufficient act of naturalization to enact *that John shall be adjudged his majesty's liege and natural subject.* There ought to be a strict and not a favourable construction of acts of naturalization.

It is clear an act of naturalization may by express words be with a *quoad*, only as to enabling in blood, or only as to inherit in the lineal descent; and whether it be so by express words, or operation of law in respect of incapacity of the person naturalized, the law will operate equally as in the cases of express words.

An act of naturalization may by express words enable in blood, or only to inherit in the lineal descent. Where there are various incapacity of the persons naturalized, the law will operate equally as in the cases of express words.

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turalized, it will make no difference; the law is the same in both cases.

If it be objected that the act of George's naturalization reaches to him and his children, and that they shall have resort to the lineal or collateral ancestor; and that John, being first naturalized, is such a collateral ancestor;—

I answer, that George's naturalization makes not John an ancestor to him, unless John were in that capacity before; no more than it makes their uncle or father an ancestor, or than it would make John an ancestor to him, if he were a denizen by letters patent only; for if John had no capacity, by virtue of this act of naturalization to transmit, George's act of naturalization will not give him power to take an estate by descent.

Explanation of the terms *natural*, and *civil or hereditary blood*.

The last thing premised is the explication of the terms of *natural*, and *civil or hereditary blood;* which though they are not in the special verdict, yet are of necessary use in the case.

The terms of *descent*, or *conveyance of natural blood*, and of *civil or hereditary blood*, *from one to another*, either in the direct line, or in the collateral or transversal line, are purely figurative, and are to be taken as figures to express one thing by another. In our acceptation, by *natural blood* no more is meant but the line, or medium, or vehiculum whereby, by nature, kindred is derived or communicated from one to another. So the line or medium whereby the grandson is of kindred to his grandfather is by deriving his being from the father, who hath his from the grandfather, who is the *propositus* or *radix;* and this is the direct line or course. But suppose the grandfather had more sons, and those sons had sons, now the kindred between the grandson and his uncles or cousin germans ariseth by reason of this union, not in the father, but in the grandfather; for they must both be in a direct line from him from whom their consanguinity or kindred is derived. And so it is between two brothers: they are of kindred one to the other, by reason they both derive in a direct line from the father, who is *medium deferens sanguinem*, by whom they come to be of kindred, and so communicates blood to all.

The terms of *descent*, or *conveyance of natural blood*, and of *civil or hereditary blood*, *from one to another*, are purely figurative.

Now *civil and hereditary blood* is that line or medium, or vehicle whereby consanguinity, which gives a capacity to inherit by law, is derived or communicated from or by one to another.

The incapacity of an alien to inherit is *propter defectum ligeanciæ et patriæ*, not

It hath been said that the distinction of civil and natural blood is not to be applied to an alien; for the incapacity of an alien to inherit is *propter defectum ligeanciæ et patriæ*, not *propter defectum sanguinis;* which if I shall admit to be true, as to a mere alien, yet it reaches not our case; which is of an

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propter defectum sanguinis.

Hale, C. B.

alien enabled to purchase, and a descent from him, if he die without issue. The escheat is *quia obiit sine hærede*, as if an alien have a son born here, and is after made denizen, and purchaseth lands, and dies without other issue, the lands escheat, *quia obiit sine hærede*; that is, there was no hereditary blood to be transmitted to his son born before, though there was a natural blood between them. And this distinction of civil and natural blood must by all means be retained; for else, as my Lord said who last argued, the father would inherit the son; and Patrick in our case would inherit to John his uncle; and certainly the *jus sanguinis duplicatum*, spoken of so much by Bracton and Britton, and the corruption of blood mentioned in all our books, are undeniable proofs of this distinction between civil or legal, and natural blood; for there is no corruption of the natural blood.

But it is agreed on all sides that this consanguinity by nature is the foundation of the civil or hereditary blood: for instance, cousins or brothers must have one common ancestor by nature to make them inheritable one to the other. And in resemblance to the derivation of the natural blood is the derivation of the civil or legal blood: there must be some *commune vinculum*, whereby the civil blood must be derived. Brother cannot inherit to brother if either of them want that civil blood, as by reason of alienship or attainder of one of them; and thus far we all agree.

But herein is the difference.

First, On the plaintiff's part it is said, that this civil or legal blood needs not to be derived higher than the brethren themselves; that, though they cannot be brethren but by the father, yet the civil blood is superinduced upon the natural blood; and the law of the land (into which by birth or naturalization of the two brethren they are translated) is the fountain of their hereditariness, that *commune vinculum*, or *aliquid tertium in quo conveniunt in regno civili.*

But, secondly, We that are for the defendant hold that, as a civil or legal blood superadded to the natural is necessary to be between brothers to make them inherit one to the other, so it is necessary this civil or legal blood must be derived from the father to make them inherit.

For as the natural blood, communicated by the common parent, makes them by nature brethren; so we conceive the civil blood communicated by the same parent, qualified to transmit it, must make them brethren inheritable. In this right of hereditary civil consanguinity between brethren we allow the law to have the part of a tutor or governor to direct this civil or hereditary right, and to keep it within rules and bounds; but not the part of a parent in the formation of it.

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To clear this, we must distinguish again upon this civil and inheritable blood. There is a civil and inheritable blood which is *ancestral*, deriving or communicating itself from or through the ancestor; and there is a civil and inheritable blood *personal*, in the *propositus* or person himself without respect to any ancestor; and this last every man hath that is an Englishman born, or is so made; he is, as it were, a fountain of himself. That this is so is undeniable; for the sons of an alien, or of a person attaint, or a bastard *eigne*, who have no legal ancestor, have yet this civil and inheritable blood personal in them to transmit to their children;—what they purchase themselves their children shall inherit, notwithstanding any incapacity of the grandfather; and this ancestral blood is such because it hath respect to the ancestor, and is not tied to an ancestral estate; for if a man purchase lands, who hath English ancestors, all those of his kindred of the ancestral blood, whether by the father of his father, the mother of his father, or the mother of his mother, are inheritable to him.

Civil and inheritable blood is *ancestral*, deriving itself from or through the ancestor; and it is *personal*, in the *propositus* or person himself without respect to any ancest

These things being premised, wherein I have been forced to be the longer by following the method of those who went before me, I come to give the reasons of my opinion; wherein I do not pretend to make any demonstrative proofs *a priori*, neither have they done it of the other side, as I think; for having varied in the grounds we have laid, as appears by what is premised, there can be no demonstrative proofs from principles not agreed on. But our law being a science, or art which consists much of individuals or particulars, I must use arguments accordingly, by analogy, similitude of cases, and adjudications.

Our law is a science which consists much of particulars, and we must use arguments by analogy and similitude of adjudged cases.

The first is, the enforcement of my Lord Coke's reason:— "that where two brothers cannot by possibility inherit the parent, they shall not inherit one to the other." Which I prove thus:—there is not one case in law that can be instanced, wherein two brothers should inherit one to the other where they cannot by possibility inherit one of their parents.

Where two brothers cannot by possibility inherit the parent, they shall not inherit one to the other.

For instance, in the other incapacities ancestral,—a man is attainted of treason or felony, and pardoned; he now sets up upon a new stock; none but his children born after can inherit to him. You may say the blood was corrupted between him and his brother, which corruption remains as between them; and I acknowledge a great difference between the case of attainder and alien in that point: an alien brother shall not hinder a descent to another brother. But suppose a man, that is attainted and pardoned, hath a brother born after his pardon; he shall not inherit.

Stanf. 195, 6.
13 E. 3. Br. 677.
1 E. 3. 4.
13 E. 3. 44.
13 H. 4. 7.
C. C. 8.

Disabilities upon attainder.

If the descent could be immediate from brother to brother,

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without respect unto the father,—why should not the brother inherit to him that is pardoned? No other reason can be given but that they are not inheritable to the father. He that was pardoned had a personal blood, but no ancestral blood.

So two sons of a person attainted, which is Hobby's case, of which I shall speak anon, if they be inheritable one unto the other, it is either in respect of the possibility which they had to inherit one another by the father, which is within my Lord Coke's reason, or the possibility which they still have to inherit one another by the mother, where there is still *integritas sanguinis*, and the line of communication continues; for either of them may inherit one the other in the mother's line; and so that also is within my Lord Coke's case.

Nonabilities in descents.

I leave the cases of disability, and come to the cases of nonability.

A bastard *eigne* enters after the death of the father; he now is heir to all purposes, save only as to the *mulier;* he hath a son, his son shall inherit upon the account of the personal blood derived from his father; this son shall be obliged by the warranty ancestral, and shall be vouched as heir; and so to all respects as to strangers looked upon as heir to the grandfather; yet if he die without issue, the *mulier* shall not inherit,—it shall escheat; what is the reason, but that there was no inheritable blood between the *mulier* and the bastard *eigne*. The bastard *eigne* was set up upon a stock of his own; he was "the commencement of his family and estate," as the phrase is used 49 E. 3. 12., and cannot transmit any inheritable blood but in a direct line.

C. C. 376. b.

Commencer de son inherison.
7 Co. 6.

I will instance nearer yet, in the case of an alien.

This is the usual way of denization.
F. H.

An alien is made denizen by letters patent; the king grants "that he and his heirs shall be lieges, and shall be reputed and taken to all purposes as Englishmen born." The children which the alien denizen shall have shall inherit; because, being made a denizen, he had a personal blood which may be transmitted in a direct line to his children. But his brother, though an Englishman born, and of English parents (which is not in our principal case) shall not inherit to him.

C. C. 8.

What reason can be given for it, but what is given in my Lord Coke.—The alien denizen could not inherit the father, which was *commune vinculum* between him and his brother; and therefore he shall not inherit to his brother, nor his brother to him. You may make the same observation in that case for the other brother's heirship as in this:—that there is an immediate descent from brother to brother—that in pleading he need not mention the father; yet the law is clear, his brother shall not be his heir.

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And truly by all the observations I can make upon all the instances that can be given, it is not only universally true, that one cannot be heir to the other, where both could not *by possibility* inherit the common parent, as my Lord Coke warily expresses it: but it is also true, that no man who is, as I said before, *commencer* of his family, or first of his family in law, can have an heir but in a direct line.

My next reason, or rather the enforcement of this, is grounded upon the distinction before made of legal and civil blood into *ancestral* and *personal*.

Every man who is a lawful subject of England, whether *factus* or *natus*, hath a personal blood, which, whatsoever impediment be in the ancestor or kindred, he may derive to his children: but to no others but to those who derive their blood *a personâ*, from his person. But if he be of lawful English ancestors, and born here, or naturalized, besides the blood derived from himself as the fountain, he hath an ancestral blood transmitted from his ancestor; by virtue whereof they who are conjoined to him in the same common ancestor, though they proceed not *a personâ*, from his person, may inherit to him, and he to them.

This ancestral blood must have a relish of the ancestors; and as in the natural blood the consanguinity in the collateral line hath its rise from the common ancestor, from whom both derive in a direct line—a brother is a brother because they have one and the same natural father;—so the law imitates *nature*—a brother cannot be a legal heir to a brother, but as he derives his blood or heirship through one and the same legal father; and therefore, in cases of descents in the collateral line, the law requires this ancestral blood, and looks upon and respects the common ancestor.

Littleton saith, that "if a purchaser die without issue, they of his blood on the part of his father shall inherit as heirs to him; and in default thereof, they of his blood, on the part of his mother; and if he have none such, it shall escheat." So that law looks upon the collateral heir to the purchaser with reference to his father or mother. Sect. 4.

So again, saith Littleton, no collateral descents can be of fee-simple land but to such as is next of kin, and of the whole blood, how remote soever to him that was last seized. So that the brother of the second venter shall not inherit. It is impossible to distinguish the whole blood from the half blood but by taking notice of the derivation of the legal blood from the parents; and that being looked into, it appears there is no *ancestral* blood descended from the parents, that is the cause his brother could not inherit him, and so there is a defect in the *ancestral* blood; and so this want of legal ancestral blood is Sect. 6.

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the reason of those other instances I gave before,—that a person attaint and pardoned,—a bastard eigne or denizen by patent cannot be inherited by their brother. They had no *ancestral legal blood*, and they can transmit none.

And so in our case Sir John Ramsey had no ancestral inheritable blood, and according to the rule *nemo dat quod non habet*. But this hath been largely insisted on before, and I pass it over.

My brother Brown said, "every purchaser of lands, as to that land, is become the common ancestor, and all the lines of descent as to it are to be made from him." I agree to it: but where he adds, "that they never go higher,"—I utterly deny it; for then the uncle or great uncle of the father's side, and for default of issue of the father's side the uncle or great uncle of the mother's side, and others of the *cep paramount*, as it is called, 49 E. 3. 12. would be excluded from inheriting, who not only go higher in the transversal line, but are forced to go higher in the direct line, in making themselves of kindred, and so making out their title.

Construction of the words of the act of naturalization.

My third reason is this,—the operative and essential words of the act of naturalization of John, which do naturalize him, and give him power to transmit an estate by hereditary descent, are the same words which are in letters patent of denization: *viz.* "*that he and his children or heirs shall be the King's natural and liege subjects of this realm, and as free to all intents and purposes as if they had been born in England.*"

Bagot's case, 7 E. 4. 29. pl. 17. (*l*) 9 E. 4. 8. 7 Co. 6.

But the words in letters patent of denization give power only to inherit in the direct line, and not in the brother to inherit; *ergo*, they shall give no further power in the act of naturalization.—I desire to be observed, I do not deny but that there is more power given by the act of naturalization, than there is by the letters patent of denization. I shall shew how, by and by.—But I say there is no more power given by those words in the act of naturalization for John to be inherited in the collateral line, than there is by letters patent of denization; for what reason can there be assigned that the propriety of speech should extend those words—"that he and his children or heirs shall be the King's lieges as born in England"—should extend only to give a capacity to his children in the letters patent of denization; and yet the same words go further in the act of naturalization?

Extent to which acts of naturalization may enable parties.

If you say the act of naturalization may do more, and extend it to the brother of the person naturalized who is born in England,—I deny it not but it may do so. And so it may do to the uncle, if there were words to that purpose, and that the meaning

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(*l*) In Bagot's case in the Year-Book, 9 E. 4. 3. the letters patent are set forth at length.

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of the act appeared that it should go so far. You yourselves deny it extends to give the uncle a capacity to inherit to the alien naturalized. And I deny it extends to give it to the brother. And if the meaning of the act be looked after, it inclines to me; for it provides only for a man and his children in the direct line. There is no ground of law as to conceive that the words should not have the same construction in this act of naturalization as they have in letters patent of denization.

Construction of public acts of parliament distinguished from that of private acts.

There is a great deal of difference between acts of Parliament, where the King's answer is, *Le Roi le veet*, which concerns all in general; and, *Soit fait come il est desire*, which concerns particular persons. These are founded upon the desires and suggestions of the party; and the same acceptation or construction as the words bear in the suggestion, the same the whole act shall have. It is not so properly an act of parliament, as a charter or grant of the King; and so expressed in the act 1 H. 7. c. 2. Indeed, the power of parliament will give them a stronger relation, and work in an estoppel or conclusion against all persons, so far as the words go, or the clear intention appears: but the words will carry no other signification or sense in such a charter by parliament, than they would in a charter out of parliament.

8 Co. 1. the Prince's case.

If the King by letters patent, or by act of oblivion, pardon one attainted of treason or felony, still the blood is corrupted. If the King's letters patent pardoning such attainder, also grant restitution of blood, the clause of restitution is void; in an act of parliament it is good. The construction of the words in the King's letters patent is the same as that of the words in a charter by parliament.

For instance, if a man be attainted of treason, or felony; by this his blood is corrupted. If the King pardon the felony by letters patent, yet the blood is corrupted. If the King pardon by act of oblivion, or general pardon, yet still the blood is corrupted; for the words carry as much in the letters patent, as in the pardon by parliament. And, therefore, there is in all pardons by parliament, not only a pardon, but a clause of restitution in blood, without which it would make no farther than a charter of pardon. But it is true, if the King pardon the attainder, and also pardon the corruption of blood, and grant restitution in blood by letters patent, the last clause is void in the letters patent, because it concerned others in point of escheat, and in point of descent. But in an act of parliament it is good, because those others, who are concerned in the act, do in law give their consent. But still the words are of the same interpretation in the King's letters patent as in the charter by parliament: but there wanted power to make them effectual, according to the words in one case which wanted not in the other.

In this act of naturalization, indeed, there is a clause, "that Sir John and his children may have any land, and make his and their resort in pedigree as heir to his or any of their ancestors, lineal or collateral, as freely as any other person born in England."

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This clause gives him and his children liberty to inherit any ancestor, lineal or collateral; and so to inherit to a brother or uncle. And I will not take advantage of it, that it gives him and his children liberty to inherit them, and not for them to inherit him; for I think that it will follow, if the bridge be made for him to go over to his uncle, his uncle may by the same bridge go to him. The rule holds in all cases of collaterals;—where one may inherit to me, I may inherit to him. In the direct line it is otherwise upon another rule—that the inheritance shall not ascend. But that a collateral kinsman shall inherit to him is not by the express words or mention of the act, but by the consequence and operation of the law from the words.

In all cases of *collateral* kindred the rule holds—where one may inherit to me, I may inherit to him; in the *direct* line it is otherwise upon another rule—that the inheritance shall not ascend.

But this clause, as I said before, will make no ancestor to Sir John, where there would have been none had he been born in England. If there be two brethren, one denized by letters patent, the other naturalized, this clause in the act of naturalization clearly gives not power to him that is denized to inherit to him that is naturalized; nor, *e converso*, to him who is naturalized to inherit to the brother who is denized; for he that is denized by letters patent hath no hereditary blood, or capacity either to take by descent, or to transmit a right of descent in the collateral line, as is agreed on all hands; and, therefore, Sir John, being an alien of foreign extraction, can make no use of this clause. But had he been of an English extraction, though an alien, according to the difference laid down before, this clause would have been of use; for then, there being a common ancestor to whom they might inherit, not only the brother but the uncle, and all the rest in the collateral line, might have inherited unto him, and he unto them.

He that is denizened by letters patent, hath no hereditary blood, or capacity either to take by descent, or to transmit a right of descent in the collateral line.

Yet such a clause in letters patent of denization, "that he shall make his resort to any ancestors, lineal or collateral," would have been void, not by reason of any other construction to be made of the words in the letters patent, than are made in the act of naturalization, but for want of power to make them effectual.

But in this case of the naturalization of John, the words that are operative are the same both in the letters patent of denization, and the act of naturalization,—"That he and his children or heirs shall be the King's natural and liege subjects, and as free to all purposes as if they had been born in England;" and, therefore, shall have the same interpretation in the one place as in the other, to extend only to children or lineal heirs, and not to brethren or collateral heirs; and if John's act of naturalization makes him no farther an ancestor, than in re-

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t to those who lineally descend from him, then (as I said re) he cannot be an ancestor to George; he hath no power ansmit an estate by descent to George, nor George by this of naturalization power to take an estate by descent from ; no more than if John had been only made a denizen.

y next reason why these two aliens, brethren, naturalized, l not inherit one to the other, is the consideration of the per- —that they were aliens born, and that, of a foreign ex- ion,—their parents being also aliens born; and that, there- all privileges and advantages whereby they may take or rit lands ought to be taken strictly, and not extended nferences or equity: and, consequently,—there being no *ex- words* in the said act of naturalization, to direct the ent in the collateral line, or otherwise than to the children, all not be extended to the brethren. And so likewise, re two sons are born of alien parents, that rule of descents l not be enlarged to extend farther than it would in case sons were denizened by letters patent.

his, I confess, is a more general reason than the former. yet my brethren who have argued for the plaintiff have ntained the contrary; and made use of it as an argument, naturalizations and adoptions are favours which are to be lified; and that the law hath rather contracted than en- ed the incapacity of an alien; which, say they, is not to be racted farther than the parallel cases of disability by at- ler will warrant.

ouching the case of attainder, I shall have occasion to k anon; but that the privileges of aliens born, as touching s, are *stricti juris*, I prove,—

irst, by the politic grounds (*n*) why an alien is not ca- e of inheritance in England; they are given in Calvin's . 1. The secrets of the realm might be thereby disco- d. 2ndly, The revenues of the realm (the sinews of war) ld be taken and enjoyed by strangers. 3dly, It tends to destruction of the realm, by admitting strangers to fortify e heart of the kingdom.

hen consider the persons here:—1. Aliens of an alien ex- ion. I shall not instance it in those born in Scotland;

Acts of naturalization of aliens of foreign extraction shall be construed strictly as to the privileges intended to be conferred in the taking of land (*m*).

The grounds of the incapacity of aliens, to inherit.

Hale, C. B. to the contrary , "That the law of England is gentle in construing disabili- 1 Ventris, 413.

kins, B. said, that "the act, *electio patris regni de aliquo bitum suum jure adoptionis*; fore, these acts of grace must be so construed, as may effect such intent." 1 Keb. 670.

Turner, B. says, That "the act is to be taken favourably, as that it doth restore men to the law of nature." 1 Keb. 588.

(*n*) See Appendix, N.

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because, (as I shall shew presently) they of Scotland are little concerned in the consequence of the case: but in two born in France or the Low Countries, whose parents are of foreign extraction, one of those is naturalized in England, which is our case,—he is still a Frenchman or Dutchman. If by being naturalized (as persons professed at this day pretend to be) they were *seculo mortui*, dead to their country, and changed their names and families with entering into their religion; or, as Tacitus speaks of the proselytes of the Jews,—*nec quicquam prius imbuti quam exuere patriam, parentes, liberos*, &c., if he had relinquished his own country and relations there, upon his naturalization, it were something. But he still owes obedience to the King of France, or the States, before this to the King of England; and if a difference fall out between the two nations, they are incompatible;—he cannot be *ad fidem utriusque regis*, but so as the one obligation is inferior to the other;—and, therefore, such a person is not to be looked upon entirely as an Englishman.

If it be objected, that he that is naturalized is to be reputed as born in England, I answer,—yet he that is born in England of alien extraction is within the same politic grounds not to have his privilege of favour extended,—his interest, dependencies, relations, correspondences, being foreign. The stat. 1 H. 7. c. 2. provides, "That any person made, or hereafter to be made denizen by letters patent, or acts of parliament, shall pay for his merchandize like custom and subsidy as he ought or should pay after that he was made denizen." 22 H. 8. c. 8. is to the same purpose. A man is afterwards naturalized, and *leges posteriores priores contrarias abrogant*; yet it hath been adjudged, such an one shall pay double the ancient customs, as it was cited at the bar. Pasch. 3 Car. Grett and Wood's case.

Moor, 791.

Privileges of an alien naturalized in England.

Next, consider the nature of the privilege which an alien naturalized hath, and it is not fit to be enlarged. Among the Romans, they had degrees in naturalizing, *jus domicilii—jus civitatis—jus tribus—jus honoris*: but he that is naturalized among us is, *ipso facto*, capable of all these at once. And it may be a question whether he be not so if he be naturalised in Scotland or Ireland; therefore, it is not fit to be extended.

Our laws relating to aliens here ought to have some analogy with the laws of other nations (o) as to us, especially our

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(o) "The use in other nations is, that they who obtain their naturalization by charters, do so for such time, and with such cautions, as may be granted unto them; and take it not by the general law of that nation whereto they were united."

The speech of Sir Edwyn Sandys,

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neighbours the French. If an Englishman be naturalized there, yet none of his collateral line shall inherit,—the same reason holds here. In the act for the last subsidies, 15 Car. 2. "every person born in England shall pay for every subsidy 2*s.* 8*d.* the pound; and every alien and stranger born out of the King's obedience, as well denizens as others, 5*s.* 4*d.*; and every alien and stranger, born out of the King's dominions, being denizens or not denizens, not being contributory to the rates aforesaid, shall pay 8*d.* every poll." Which words "denizens or not denizens" must extend to those who are naturalized, or else they pay nothing at all, for they are not born in England; and the words "denizens" in the act must be understood of all persons whatsoever born out of the King's dominions, whether naturalized or not. For the word *denizen*, in its proper signification, extends to such; as appears by the statute, 1 H. 7. c. 2., which I before cited; and our books name three sorts of denization, by acts of parliament, by patent, or by conquest; the word of naturalization is but lately brought in. The very same distinction between those born in England, and those born out of the King's dominions, whether denizens or not denizens, is made in the very same words in the act of parliament 7 Jac.; in which parliament George here was naturalized, and in other parliaments, preceding and subsequent. And many other acts of parliaments there are, some in matters relating to trade and employment, which have the same distinction. So that it is apparent that our statute laws look with a stricter eye upon aliens, though naturalized, than those that are born here. And so doth the common law too, as I said before; for though a man be made a denizen by patent *to him and his heirs*, which is the common way of denization, and he is thereby made *tanquam ligeus et indigena*, yet the law will not extend the words to their full propriety: but he shall have no heirs to inherit in the collateral line, though born in England, and of a capacity to take an inheritance.

Signification of the word "*denizen*."

1 H. 7. c. 2.
11 H. 7. c. 14.
22 H. 8. c. 8.
7 C. 6.

7 Co. 6.

The common way of denization and its construction.

Two instances have been given, that the laws concerning aliens should be taken in favour of them.

The first, the case of the *post nati* in Scotland, adjudged in favour of aliens. To which I answer, there is a great difference between the endenization, or granting the benefit of English birthright by wholesale; there they shall have better

Naturalization of individuals distinguished from that of whole nations.

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in the case of the *post nati*. Moor's Rep. 792. and 2 State Trials, 564. In the case of Bishop Burnet, charged with high treason, there are some remarks on the force of naturalizations in foreign countries. 11 State Trials, p. 1103. Howel's edit.

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measure. That whole nation being to that purpose made part of this, and each nation mutually enjoying the freedom of the other; and, therefore, ought to be taken favourably; and a granting of such privilege by retail, as it were, to particular persons, such privileges being by all laws strictly taken; 2dly, nothing of equity was in that case, but the law was the same before, that those who were born under the King's obedience in one kingdom should be his subjects in all his dominions, and is plain by 17 E. 2. Prerog. Regis, in the case of the Normans, and the common practice concerning those parts of France which belonged to the King of England.

Bacon's case, 9 Cro. 602. Stephenson's case.

The second instance upon 25 E. 3. c. 1, *de natis ultra mare*,—That it declares the issue born beyond sea, of an Englishman upon an Englishwoman, shall be denizens; and yet construction hath been made that, though an English merchant marry a foreigner, and hath issue by her beyond sea, that issue is a natural born subject.

To which I answer,—1st, This case is concerning those whose ancestors are of English extraction, whose naturalization hath some resemblance of a restitution, because he is grafted, as I said before, into an old legal stock, his dependencies, interest, relations, being English; our case of aliens of a foreign extraction. But, 2dly, in the particular; the statute, 25 E. 3., extended not to the cases of Bacon and Stephenson: but by the very common law, if a *merchant* have a son by a feme alien, the issue is a denizen; as appears by the statute 42 E. 3. c. 10. So that, by the common law, a merchant might go beyond the sea, without licence, for the business of traffic and merchandize; and a merchant, who is beyond the seas upon traffic and merchandize, is supposed to have *animum revertendi*; and his case (it being *pro bono publico* to go beyond the sea for traffic and commerce) is like the case of an ambassador, who being beyond sea only on his master's errand, his children are natural born subjects (*p*).

13 Eliz. 296. C. pl. 180.

But I hold the law to be, that if an Englishman, not licensed or qualified by law as a merchant, go beyond sea to live there, *not* for the cause of religion, and there marry a feme alien, and hath issue, that his issue is an alien (*q*). The common practice to procure letters patent of denization, or acts of naturalization in such cases, proves it; and so do all those authorities in

25 E. 3. Cosinge, 5. 22 H. 6. 38. C. C. 129. a. 7 Co. 18.

(*p*) King *v.* Eaton, Litt. Rep. 23. was on this point; and it seems to be the case alluded to in the text as Stephenson's: Littleton's Reports were not printed till 1683.

(*q*) See the statutes 7 Ann. c. 5.; 10 Ann. c. 5.; 4 G. 2, c. 21.

law, which put and admit the case of an Englishwoman having an alien son beyond sea. And the opinion of Hussey (*r*), R. 3. 4., is not the contrary:—*son opinion fuit que celuy que e nee per dela et son pere et mere fueront Anglois, que lour issue enheritera per le comen. ley, mes l'estatut fait cleer*, &c.; for he puts his case where *both father and mother* are English, and not where the *father* only is English, that the child born beyond sea shall inherit by the common law; and if the law should be otherwise, that the son of an Englishman or Scotchman, born beyond seas of an alien mother, should be as those born in England, then the sons of those sons should be denizens, and *sati natorum*, &c.; and so the King have more subjects who shall have the privilege of Englishmen, than is fit or safe for the realm. So that I take it, the stat. of 25 E. 3. is taken strictly according to the letter.

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Fitz. tit. Tyel 29.

The stat. of 25 E. 3. is taken strictly according to the letter.

Nay, where the father and mother are both English (though I will not now deliver my positive opinion in the point, not being now before us,) yet I may say there is more authority for it than against it, if the parents went over without licence in law, or licence in fact; or against a prohibition *ne exeat regno*, or return not after a privy seal, that the issue born after, beyond sea, shall not inherit. So was the judgment of the case between Hide and Hill, 24 Eliz. B. R. 3 Cr. 3.; and I have the same under the hand of a reverend Judge in Queen Elizabeth's time without name of the person; and yet the stat. 25 E. 3. is general, where the children are born of an Englishman upon an Englishwoman; and doth not make any difference where the parents have any licence to stay, or not.

A. 216.

So that upon all these reasons I do conceive that the laws and statutes made in the behalf of aliens (especially of foreign extraction) ought to be taken strictly; and, consequently, this act of naturalization of John Ramsay shall not be extended beyond the words of it to direct the descent to any other than his children.

The law and statutes made in the behalf of aliens, especially of foreign extraction, are to be taken strictly.

Some other reasons there are whereupon I shall enforce my opinion in this great point, that a brother naturalized shall not inherit his brother naturalized: but they arise upon the answers to the objections made on the plaintiff's part; which, therefore, is the next thing to be taken into consideration.

(*r*), See Doe d. Durouse *v.* Jones, 4 T. R. 300, where the position of Mr. Justice Ashurst that "the circumstance of a person being born out of the King's ligeance makes him *prima facie* an alien," seems too broad. See Hussey's opinion in the text; and the petition to which 25 E. 3. c. 1. refers, notes that there was then no fixed law on this point. Cotton's Records.

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The arguments on the part of the plaintiff are drawn from the reason of law, and from authority.

From the reason of law.

The great objection which is made from the reason of law is this, that one brother may claim as heir to his brother without any *mention* of the father; and therefore, the disability, or incapacity of the father, shall not hinder him from inheriting his brother.

This hath been enforced several ways: (*s*) as first, and principally, that which I mentioned before that the descent from brother to brother, though it be a collateral descent, is an immediate descent between the brothers; and no impediment in the ancestors will hinder the descent between them. And this is proved,—

1st, By the pleading;—it is enough to make the descent, *ut fratri et hæredi*, without going any further.

2dly, From the computation of degrees;—according to the law of England, brother and brother make but one degree.

3dly, That the half-blood doth *not* (*t*) impede the descent between brothers, which it doth not to the uncle, and other descents collateral; which argues that the descent between brothers is immediate, if at all; and this is farther enforced, that the brother by the second venter is heir to the father, and yet shall not inherit his brother.

And, therefore, in a descent between them, the law respects only their immediate relation between them as brothers; and not their relation in respect of their father.

As to the argument from pleading.

Touching this enforcement of the objection by making the descent from brother to brother to be an immediate descent, I must touch what I have before said; that is to say, the descent of the land from brother to brother is not meant here; for so the descent to the uncle, or any other to whom the land next and immediately comes after the death of the brother, will be an immediate descent, because it is enough to say, that one brother may resort in his pedigree to the other without mentioning the father, and demand as brother and heir, or plead a descent as brother and heir, without naming the father in his pleading, whereas in all other cases of pleading the descent except it be from father to son, he sets forth he is cousin and heir, and shews *comment cosin*, and so names the father or other person who is *commune vinculum*, or common stock.

If we admit this to be called in this sense an immediate de-

(*s*) 1 Ventris 413; and see Watkins on Descents 111, note (*a*).

(*t*) Mr. Hargrave suggests that the *not* is improperly inserted here.

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scent, yet it must be taken only as an immediate descent in the collateral line, and hath no resemblance to an immediate descent in the direct line; for though (as the case was put) the grandfather be attainted, or an alien; yet the father born in England hath a personal blood of his own, which he derives to his son who shall therefore inherit to him without respect to the incapacity of the grandfather, yet as to descent from brother to brother the case is otherwise. The blood is not derived, but communicated; which communication cannot be otherwise than *mediante patre.*

But to give a further answer to it; all this touching the immediateness of the descent amounts to no more than what was said in other terms, that one brother in pleading may claim as heir to his brother without mention of his father, which I agree. But the inference from thence, that therefore the defect or incapacity of the father shall not hinder one brother from inheriting the other brother, is that which we on the defendant's part do deny.

For, first, this reason is grounded upon the formality of pleading; for to set forth a descent *fratri et hæredi* is short and certain to a common intent, which is all the law requires. But this concludes not that therefore he is heir; for I may allege what I can to falsify his being heir, though he be his brother; as bastardy, or that an elder brother was attainted, and pardoned; or attainted, and survived the father; or that his brother was of the half-blood or the like; or if it be not pleaded, yet if on a verdict the matter appear to the Court (as in our principal case it does) the Court are to adjudge upon the whole record; and shall adjudge him heir if he be so; and not heir if he be not so; notwithstanding he pleads a descent *ut fratri et hæredi.* And to infer because he *pleads* that he is *frater et hæres*, that, therefore, he is *frater et hæres*, is clearly an inconsequence.

Again, this manner of pleading *fratri et hæredi*, without going further, is not appropriated to the brother upon any substantial difference from the pleading *ut consanguineo et hæredi;* but from the barrenness of the words, our law tying itself strictly to the words of the register. We have no words of descent, whether in a direct or collateral line, but *filius frater consanguineus.* If we could have adopted the word *fratruus* as well as *frater*, he might have pleaded a descent *fratri et hæredi;* and then, by the force of this objection, the uncle of an alien's son might inherit him. But the truth is, we have no such legal word. If my uncle be my heir, it is pleaded, *ut consanguineo et hæredi*, as well as where a remote kinsman is my heir. Nay, if my grandchild be my heir, he

The argument from the manner of pleading limited; for the barrenness of language will not admit the exact nature of every case to be represented in pleading.

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shall plead it *ut consanguineo et hæredi*; for the word *nepoti* is of too large extent, and is not in our law Latin in the register; and yet my grandchild is as near me in the direct line, as my brother in the transversal line. There is certainty enough, *primâ facie*, when I say *fratri et hæredi*. The Court knows how near of kin I am: I am brother but one way; but I may be cousin many ways. And, therefore, that it may appear how I am heir, I must, in all these cases when I plead as cousin, shew *comment cosin*, to ascertain the kindred to the Court, and the party; to which he may reply, if he deny my kindred. And yet, if I fail in shewing *comment cosin*, it is but matter of form, and aided upon a general demurrer; as was adjudged in Herd and Baskervill's case: which shews that this observation, from the not mentioning the father in pleading a descent from the brother, arises from the form of pleading, and not the substance of the matter. If the uncle make title to the nephew's lands, he sets forth that he is *frater patris*; if he make title to the brother's land, then he sets forth that he is *frater*; what is that but in the *periphrasis filius patris* who was an alien? In the one case the kindred to the father is expressed, and in the other it is necessarily implied, and here expressly found by verdict: when I do name the father, I name him only as father; his incapacity by alienship appears not on my shewing. If it after appears by the other side, or on verdict, that he is an alien, whether that be an impediment, or not an impediment, to a descent will rest upon the judgment of law, but ariseth not upon my naming him.

Hobart 233. Mich. 12 Jac. Rot. 650.

Com. 443. a.

In Clere's case, Sir Edward Clere, the uncle, makes title to his nephew, Clere Haddon, as his cousin and heir, *viz.* son and heir of Sir John Clere, father of Margaret, mother of Clere Haddon; and yet he might have pleaded as brother and heir of Margaret, mother of Clere Haddon. And in like manner Young there makes title "as son and heir of John Young, father of Dorothy, mother of Walter Haddon, father of Clere." And certainly that pleading is good to pass through the brother to the father, the common stock. By the same reason, if John Ramsay, the lessor here, made his title in pleading (as he might) as son and heir of George, son of Robert, father of Sir John Ramsay, the naming of Robert, because he was an alien, would it have prejudiced him in making his descent? If it would, by the same reason the finding it here by the special verdict will prejudice him. It shews that if it would not, then the impediment to descent ancestral is not by the naming or not naming the father. It shews that there is no necessity to plead that George is *frater et hæres*, but *filius Roberti, patris Johannis*

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Ramsey. And so as to the manner of pleading, it is but formality.

Thirdly, The rule itself, out of which the argument from pleading is enforced, holds not generally of either side, either that I shall not be barred by reason of the act, or defect of an ancestor, whom I need not name; or that I should be barred by the act or defect of an ancestor whom I must name in my pedigree or pleading. This hath been spoken to at large, and cases instanced on both kinds by my brothers who argued on my side. I wave them not: but I shall enforce them another way *argumento ad homines*.

Incapacity of those through whom a *pedigree* is derived distinguished from that of those through whom the *title* is taken.

By their grounds, the naming the father, alien, in deriving the pedigree between the nephew and uncle, will not hinder a descent. And I say by the same reason the not naming the father, alien, in the pedigree between brother and brother, will not advantage the descent; for they have held that it is *defectus ligeantiæ*, not any disability or *defectus sanguinis civilis*, that incapacitates an alien. And upon that ground I infer, that in all cases of incapacity ancestral, when I make my resort only to him for my pedigree, not title, my naming him doth not hinder me as to a fee simple estate; for the case of an estate tail is otherwise by virtue of the stat. 32 H. 8.; that was the ground of Edwards and Roger's case.

The fine levied by the uncle of an idiot hinders not the son of the uncle to inherit the idiot.

The fine levied by the uncle of an idiot hinders not the son of the uncle to inherit the idiot. It was said, that it was a bar, not a disability; and I agree the difference; for a disability properly supposeth a crime, but this bar by fine no other than an inability, or incapacity to take put upon him by his own act.

The uncle shall entitle himself as heir to the nephew, though the father who hath no capacity to take by the common law, or though another brother who hath entered into religion, and so is barred by his own act; and so the uncle of the mother may bring his appeal of the death of the nephew, and make himself heir through the mother, who is barred by the statute.

M. Ch. 34.
17 E. 4. 1.
C. C. 25.
15 E. 2.
Cor. 385.
20 H. 6. 43.

I do not remember that any case can be instanced where the incapacity of him through whom I derive my pedigree only shall hurt me, if I be not hindered *per defectum sanguinis hæreditarii*. So that upon this ground Patrick may derive his pedigree through her father Nicholas to John the uncle; and, consequently, would have a better right than George or his issue. Whereas on the grounds which we have laid, Patrick and his uncle John cannot derive an hereditary blood from one common ancestor; for Robert the father to one, and grandfather to the other, the *commune vinculum*, was an alien; and, therefore, they could not inherit the one the other. And whereas it is said that the natural blood derived from the pa-

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rents makes John and George to be brothers, but it is the law which superinduces and clothes that natural blood with an hereditary quality, whereby they may inherit one the other, although this is *gratis dictum*, and may be as easily denied as granted, yet, if true, there is the same reason that the law should also clothe the same natural blood, which makes John and Patrick uncle and nephew, with the like hereditary quality; and then also the defendant would have a better title than the plaintiff.

I say, the mentioning of the alien father, in the pedigree from the son to the uncle, upon the grounds laid down by my brethren who argued for the plaintiff, is no reason from hindering the uncle from inheriting to the nephew; and, *pari ratione*, the not mentioning the alien father in the pedigree between the brothers is no reason why one brother should inherit to the other. If Patrick had purchased lands, the naming Nicholas his father in the pedigree was not the cause why John, the Earl, could not inherit to Patrick; and, *pari ratione*, the not naming Robert, the father of John, in the pedigree between him and his brother, is not a reason why George may inherit John.

The consequence holds upon the rule and reason of parallels: but I enforce it by a stronger argument in our principal case.

If John, the uncle, might inherit to Patrick the nephew, then Patrick might also inherit to John the uncle; and so the lessor of the plaintiff, coming from a younger brother, would have no title; for in collateral descents the rule most certainly holds, if the bridge be made up for me to pass over, and to inherit my uncle, it is also made up for my uncle to pass over, and to inherit me. That was agreed by all that argued in Godfrey and Dixon's case; that where the words of the naturalizations of Daniel were, "that he shall be enabled to enjoy lands to any ancestor lineal or collateral," that though it be not expressed in the act, it necessarily follows that a collateral ancestor may be heir to him; and it was a chief cause of the judgment that was given in that case; as in case of an act of restitution of a person attainted, the words are "that he shall be restored in blood, and inheritable to his ancestor;" but no words in the act, that his ancestors or cousins shall be inheritable to him; and yet they are inheritable to him, as was agreed in that case, and is also proved by Courtney's case.

C. Pl. Cor. 241.

So that the consequence being clear that if John may be heir to Patrick, Patrick may be heir to him, I shall now endeavour to prove the antecedent or proposition, that the alienship of Nicholas, the father of Patrick, is no reason to hinder John from inheriting to Patrick by the ground laid down by my brother.

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And herein I must make use of the distinction I took before, between a disability (which properly ariseth by reason of crime) and a non-ability or incapacity. My brethren of the other side have said that the reason why an alien shall not inherit or be inherited is from a disability in him: but it is a want of ability; no defect in his blood, as they say, but an incapacity by law in respect of the place of his birth.

This being their ground, hereupon I assume, that no case can be put where I claim an estate in fee-simple from an ancestor lineal or collateral, that the incapacity or inability of another ancestor through whom I derive my pedigree only shall hinder me, unless it be *propter defectum sanguinis hæreditarii*, whereby he should become my legal ancestor.

I say, *fee simple estate*; for the case of an estate tail is otherwise, upon the words of the stat. of 32 H. 8., as it appears in the cases of Stobble and Bradstocke, Mackwilliam's case, and Wingfield and Duncombe's case. And I say where I derive my "pedigree" only; for where I derive my *title*, it is otherwise. That was the ground of Edwards and Roger's case; which in effect was but this:—The uncle of an idiot levies a fine, and dies,—the idiot dies; the son of the uncle shall inherit, though he must make his pedigree through his father to come to the idiot. The difference was made that this was not a disability, but a bar. And I agree the difference; for a disability, as I said before, properly supposeth a crime: but a bar is but an inability or incapacity put upon him to take by his own act. His fine puts a non-ability upon himself to take, and upon his son too, if he had survived the idiot; for then he makes his title through heirs, and not his pedigree only.

Hob. 332. 254. 1 Cr. 524. Tr. 16 Car.

I shall therefore put cases of non-ability in the ancestor of all hands, whether by the common law, or by the act of the party, or by the statute law. And yet in none of these the resort for the pedigree shall hinder the party. Littleton's case,—The son purchaseth lands, and dies without issue, in the life of his father, the uncle shall inherit him; and yet must make his pedigree through his father, whose incapacity and non-ability by law to take from his son hindered him, but did not hinder the uncle. But if the uncle die, the father shall not take benefit of a warranty made to the son, though the uncle might; for the uncle made only the pedigree through the father: but the father must make his title to the warranty from the son, which the law allows not.

The father cannot take the benefit of a warranty made to a son.

So in our case, if there could be a collateral descent from the Earl of Holderness, the obstacle by the father would not hinder the uncle; because it is an impediment only in the pedigree, unless you suppose a defect in the blood, which makes him no

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legal ancestor, or a disability by the alienship, which my brethren would not have. So if the heir apparent of the purchaser had entered into religion, and were possessed, by his own act there is an incapacity or non-ability in him to take; and yet the uncle, or grandfield, or other cousin, may make resort in pedigree through him. A woman hath issue a son, who is murdered, not having any heir of the part of the father; at the common law a woman might have had an appeal of the death of any of her ancestors; by M. Ch. cap. 34. *nullus capiatur, aut imprisonetur propter appellam feminæ de morte alterius quam viri sui*; so that she cannot bring the appeal. 17 E. 4. 1. by the opinion of four judges against three, the uncle of the part of the mother shall have the appeal, though he must in his pedigree make mention of the mother; notwithstanding the book of 20 H. 6. 43.: but, agreeable to the judgment of all the judges, 15 E. 2. Cor. 385. (*u*) And Stamford 58. takes the authority of 17 E. 4. 1. to be accordant. And I hold it to be agreeable both to law and reason, and my Lord Coke is express in it.

If the heir apparent of a purchaser become by his own act incapable to take land, yet his uncle or grandfather, or other cousin, may make resort in pedigree through him.

C. C. 25.

Nay, even in the case of disability for a crime, where it extends not to corruption of blood, which is a distinct penalty inflicted by law, resort as to the pedigree may be made through an ancestor lineal disabled; as William Delawar was disabled during his life to the barony, yet his son might make his pedigree through him.

11 C. 1. C. pl. Cor. Courtney.

So then upon my brethren's grounds there being no defect of hereditary blood in the alien father, and no other impediment without a disability by reason of crime being of force to hinder the resort as to the pedigree, would not hinder John the uncle to inherit to Patrick, or Patrick to inherit John his uncle; for Nicholas is as to legal blood *tanquam persona non existens*.

So that, first, the setting forth that he is *frater et hæres*, without mentioning the father, makes not the brother heir, if he be not so in truth.

2dly, It is grounded upon the form of pleading, not the substance of the matter.

It is not a sound rule, either that the naming an ancestor who is under an incapacity shall bar a man from resorting through him in pedigree to another ancestor; or that he shall not be barred where he needs not name such an ancestor.

3dly, It is no rule that holds either that the naming an ancestor who is under an incapacity shall bar a man from resorting through him in pedigree to another ancestor; or that he shall not be barred where he needs not name such an ancestor; for if the middle brother be attainted, and survive the eldest, though he die before entry, the youngest brother shall be barred, and yet need not name him in his pedigree.

(*u*) Fitzherbert.

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And, 4thly, by the same reason that the brother, who doth not mention the father in his pedigree, may inherit his brother; the uncle who is not hindered to name him in the pedigree might inherit the nephew, and the nephew inherit the uncle, and exclude George, the younger brother.

And therefore, whereas it is said that the natural blood derived from the parents makes John and George to be brothers; but it is the law that superinduces and clothes that natural blood with an hereditary quality whereby they may inherit one the other; although this is *gratis dictum*, and may be as easily denied as granted; yet if true, there is the same reason that the law should also clothe the same natural blood which makes John and Patrick uncle and nephew, with the like hereditary quality; and then also the defendant would have a better title than the plaintiff.

I have done with this part of the objection; only I would not be misunderstood, that I set up a title to Patrick, the son of Nicholas. I urge it only as a consequent of the other opinion, that Patrick would inherit to John his uncle; whereas, on the grounds which we have laid, it is clear Patrick and his uncle John cannot derive an hereditary blood from one common ancestor; or, as my Lord Coke's reason is, could not by any possibility inherit any common ancestor; for Robert, the father to the one, and grandfather to the other, that is the *commune vinculum*, was an alien; and therefore they cannot inherit one the other.

As to the argument from degrees in descents.

I come now to the other enforcement of the objection:—that brother and brother according to the law of England make but one degree; (*w*) from whence it is inferred that the descent between them is immediate. If I should agree, that this is an immediate descent in the collateral line in such sense as it is before explained, under pardon it doth not at all hurt my conclusion. But yet, I conceive neither the premises nor the inference are warrantable by our law.

It is said that, according to the canon law, *frater et soror sunt in primo gradu;* and, therefore, prohibiting marriage between kindred within the fourth degree takes brother and sister to be the first degree of the four: and it is urged that the law of England, in the computation of the degrees of consanguinity, agrees with the canon law (*x*).

I answer, that the common law in the computation of de-

(*w*) This seems to be the foundation of the opinion of Lord Hale, who rejects the arguments on the words of the statute relied on by some of the other Judges, 1 Ventris 423. 1 Keble 579, &c.

(*x*) The manuscript is "common" by an obvious mistake: but the passage is so printed also in the judgment of Hale, C. B. in 1 Ventris 424.

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grees, follows the canon law, because right of marriage is properly of ecclesiastical cognizance, which is guided by the canon law; but in other cases it doth not account the degrees according to the canon law.

The Doctors of the Commons, who are doctors *utriusque juris*, gives the reason why the canonists reckon their degrees not by one and by one as the civil law doth, but by two and by two.—Because the canon law doth *versari circa matrimonia*, wherein two persons are at once concerned: but the civil law is touching successions to estates, wherein but one at once and successively is concerned; and that is our present case.

Litt. Sect. 20. intends it no further. The difference of the reckoning of degrees by the canon and by the civil law.

The truth is,—where I fix the point of my compass to make a circle with the other point, there is my centre; so doth our common law, where it makes its *propositus*. "If we will know in what degree of kindred two do stand, according to the *civil* law, we begin our reckoning from one, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count; and it will appear in what degree they are. For example, in brother's sons, take one of them, and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth degree; just as it was in the case of challenge. But if we will know in what degree the sons of two brothers stand by the *canon* law, we begin ever from the common stock. We begin from the grandfather, and descend to one son, that is one degree; then descend to his son, that is another degree; then descend again from the grandfather to his other son, that is one degree; then descend to his son, that is another degree. So in what degree either of them are distant from the common stock, in the same degree they are distant between themselves."

Thus far my Lord Coke,—from whom I infer, that in reckoning upwards as the civilians, through the common stock, or downwards, as the canonists, from the common stock, both comes to one, though they differ in words; and the immediateness of the descent is no more proved from the one than the other, and a party from whom it reckons, thence it counts the degrees. Upon a gift in frank marriage, it reckons the first degree from the donors to the donees, whether the wife be sister, or daughter, or cousin. In writs of entry it reckons the degrees with respect to the seisin, not the kindred. In challenges it sets forth the whole kindred, as in Vernon and Manners' case, "that Zouch, the sheriff, is by the common ancestor, Roos, *consanguineus* to the tenant, *viz. filius* Georgii Zouch, &c. and runs on to Elizabeth, daughter of George Lord

Litt. Sect. 20.

Com. 425.

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Com. 451. Clere and Brooke's case.

Roos, father of William Lord Roos, father of Thomas Lord Roos, &c." And it is not sufficient to say, "sister of William Lord Roos, father of Thomas," as the plaintiff here would have it. And the degrees of consanguinity in Bracton, and the tree of consanguinity which he mentions, is according to the civil law, as is expressly said, Com. 451. a., and not according to the canon law. And so, in shewing *comment cosin* to a collateral ancestor, we reckon according to the civil law, upward to the common stock, and so down again, as appears by Clere's case, Com. 451.

But if I should agree that the computation of degrees is according to the canon law, which neither my Lord Coke nor Littleton do affirm generally, but only in respect of the computation of degrees in *marriage,—per le St. Eglise*; yet, as I conceive, the plaintiff gains nothing by it. My Lord Coke saith, "Whethersoever of these ways we reckon, respect is had to the father, who is the radix, or common stock." C. C. 24.

For the objection (*y*), that the half-blood impedes the descent between brothers, which it doth not to the uncle and other descents collateral; and that, therefore, the descent between brothers is immediate.—It was inferred, first, for that the uncle hath no more of the blood of the mother than the brother by the second *venter*. Secondly, That the brother of the second *venter* hath the immediate blood of the father, which the uncle hath not, but only as they meet in the grandfather. Thirdly, That if in the line between brother and brother the law took notice of the father as the medium thereof, the brother by the second *venter* should rather succeed the other brother, because he is heir to the father; and, therefore, in the descents between brothers, the law respects only the immediate relation of the brothers, though the foundation of the consanguinity is their father and mother.

I do not thoroughly understand the necessity of the consequence, that the descent is immediate, because the brother of the half-blood shall not inherit; and, therefore, it seems to me to be a sufficient answer to say, that the uncle of the half-blood (*z*) shall no more inherit the nephew than the brother of the half-blood.

But I further answer, that in descents from brother to brother, the law respects not only the father but the mother also of him from whom the descent is; and her kindred is in some cases inheritable; so that the argument that the son of the second *venter* is heir to the father, and, therefore, should in-

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(*y*) See 1 Ventris 424. in Hale's judgment.

(*z*) Lord Hale denies this.

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herit rather than the uncle, if the law takes notice of the father, holds not; for the law, indeed, takes notice of the father, but not of him alone, but of the mother also.

But to clear this farther:—Littleton's text is, (which I cited before)—"None shall have land of fee simple by descent, as heir to any man, unless he be his heir of the whole blood," so that the law requires entirety, or integrity of blood. This entirety of blood—what is it but to have the same common parents, both father and mother? The father and the mother are the *commune vinculum*, or *copula*; and if they have not the same father and the same mother, the links are fastened but at one end.

Now this whole blood or half-blood (as hath been formerly urged) cannot be said to be in the brothers, in respect of themselves, but in respect of their parents;—for what makes the half-blood, but that they had several parents on one side? or the whole blood, but that they had the same parents on both sides? which, in my opinion, is a strong argument for me; and manifestly proves that the law in descents from brother to brother looks to the derivation of the blood from the parents. None can say that they are of the half-blood one to another, but by resort to their parents, *viz.* that they had several mothers, and one father. As to the ancestral blood of the son, the father and mother may be said each of them to contribute half to the blood of the son; the father two bloods, *viz.* the bloods of his father and mother; and the mother two bloods, *viz.* the bloods of her father and mother; as C. C. 12. instances in the case of Fairfield. Now, when they are of two *venters*, they agree but in half the blood, *viz.* in two of these four bloods transmitted by the father. There is but a half-blood, or two bloods of the four, to make up the *copula* or *commune vinculum*.

But otherwise it is of the uncle; for, though he be remoter in degree than the brother of the half-blood, yet the *commune vinculum*, or *copula*, wherein they agree, that is the grandfather and grandmother communicated to the uncle, and the nephew to whom he is to inherit, four bloods:—*viz.* the bloods of the father and mother of the grandfather, and the two bloods of the father and mother of the grandmother, which makes them inheritable. And if the uncle were of the half-blood to the father, and did not communicate of these four bloods, he could not inherit any more than the half-brother, as I said before.

It is true, the same blood is communicated from the grandparents to the grand-children, the two brothers of the half-blood, which is communicated to the uncle of the whole blood;

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but it is, *mediantibus parentibus*, who are not the same, they having several mothers; and, therefore, that union which they have in their parents is not sufficient for want of entirety of blood. And as to the union which the two brethren have one with the other by their grand-parents as a common stock, the uncle is nearer that common stock than the half-brother; and though the uncle be no more of kindred to the mother of the elder son, than is the younger son of the half-blood, yet the law looks to the immediate stock, the immediate ancestor in whom they agree, requiring therein *integritatem sanguinis*, and prefers the uncle who hath the entire blood from the immediate ancestor, wherein they join, before the other brother who hath it not.

Why the law prefers the uncle, or remote cousins, before the brother of the half-blood in natural reason will be as difficult to prove, as it is why the uncle or remote cousin shall inherit before the father. It is sufficient there are positive grounds and rules in law for it, *et principia non sunt probanda*. But upon the whole matter, as I conceive, it appears that the consideration of the whole and half-blood in descents between brothes and brother, the law respects not only the immediate relation between brothers, but also the ancestors from, and by whom their blood is derived and communicated.

I have done with the objections on the plaintiff's part; I now descend to the authorities.

The authorities which this case itself hath made have not been much insisted on by my brothers; and, indeed, rather gave occasion to this special verdict, which was found in the same terms in 1658, than settled the question, there being but one argument, that ever I heard, made in it at the bench, in case, B. R. argued by Glyn donque Chief Justice (*bb*).

P. 1659 (*aa*). Foster and Ramsey's

(*aa*) In No. 48. of the Hargrave MSS. there are three notes of successive arguments of this case in the Upper Bench,—p. 88. b. T. T. 1657. The authorities cited are,—1 Instit. folio 8, 12, and 84.; 6 Rep. 38.; Dyer 274.; 3 Inst. 241.; 2 H. 6. 38.; F. Cosinage, 5 *pur le volunt*.—20 H. 6. 43.; Dyer 337.; Br. Corporation. 77. Perk. 54.; 6 Rep. Wild's case. Br. Nosme; 35 Doct. and St. *Con.*

P. 100. b. T. R. 1657. The case was argued this term by Shaftoe for the plaintiff. On the question of alienage he cites Stamford, Pl. Cor. 195, 196. on the derivation of title from brother to brother, he cites Edwards and Rogers, Cro. Rep. 377. 390, 391. and Cro. 313.; Bradstock v. Stowell, Dyer, 274.; and states the opinion of Co. Inst. 8. to be drawn from Hobby's case.

On the question whether heir shall be a word of purchase, he cites 11 E. 4. 6. devise *uni filii est void per le uncertainty, Et un devise ne poit direct. un descent enconter les rules de ley.* And 27 H. 8. 27.; Dy. 333.; Com. 345.; Fitzh. Devise 27. *dit, que devise al heir de J. S. (J. S. esteant all aint.) est void* (case put by Flemming in Hoby's case). It

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another court, and depending the suit, and grounded principally upon the authority of Godfrey and Dixon's case, to which I hope I shall give a satisfactory answer; and he said that all the expressions of Coke put together did not amount to an absolute opinion, fol. 8.

On the question of the devise, Twisden relied on 9 H. 6. 23. 2 H. 7. 13.; 19 H. 8. 10.

Serj. Maynard, *contrà*, argued against the brothers being heritable one to the other, and cited 22 H. 6. 38. ff. Cosinage 5.; 42 E. 3. 2. Hoby's case, and Inst. 8.

Ch. J. Glynn, *Le main point est sur le Act de Naturalization, Thos. Maynard dit in son argument que ce ne done plus que naturalization per birth. Adjornatur.*

Two authorities are relied upon. The first is Hobby's case, upon which the great stress hath been laid, in 40 and 41 Eliz. *in scacc.* William Hobby had issue by Alice his wife, Philip and Mary, he is attainted and dies;—Philip purchaseth lands, and dies without issue;—and it was adjudged that, notwithstanding the father's attainder, Mary shall inherit her brother Philip: and thence is inferred, that the father is not such a medium or nexus, as is looked upon by the law as the means deriving the descent between two brothers. In answer to which I shall first consider the authority of the case, and then the resemblance it hath to ours.

It was an information brought by the attorney-general, Mich. 40 and 41 Eliz. 21 Nov. in the Exchequer, on behalf of the Queen, against Boraston and Adams, for intrusion into Alton Woods:—the very same lands which are in Alton Wood's case, in 1 Co., and the same Anne, Countess of Warwick, concerned in it.

After argument at the bar, by Flemming, solicitor-general to the Queen, and Stephens for the defendant, it was adjudged,

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admits in cases *de restitution, que sont mult. favor in ley, tiel limitation est bon. Vid.* 3 Inst. E. 41. *le cas de Wm. de Albo monasterio; car la le party restore solement est favore.* Finch, *contra; le ley respect le fountain de sank.* Inst. 84, 187. Ogle's case, *et le devise est bon car les parols sont sufficient description de person*, H. 4. E. 6. Sr. ffr. M. rep. *devise al children semble que un bastard prendra per ceo.*"

P. 104. b. T. Hil. 1657. Twisden for the plaintiff, cited on the derivation of title from brother to brother, 22 H. 6. 28. p. Newton, Dr. and St. 13. Br. Denizen 19.; 1 Inst. 8.; Br. Escheate, 38. "*Lou frere ne clayme interest del frere, la un frere inheritera al auter.*" Instit. 84. and 187. Ogle's case, 8 H. 6.; 2 Hob. Rep. 232. a. Heard *v.* Baskerville, and 392. Mackwilliams's case, Dyer 351. 332. and 374.; 1 Inst. 241. Marquis of Exeter's case.

(*bb*) 2 Siderfin. 150. To the marginal note, Mr. Umfreville adds this reference,—"MSS. (1654) 132, 143."

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without argument at the bench that ever I could hear, by the three barons, Periam, Clerk, and Ewens, against the Queen, in 8vis Mich. following. So that the information coming in but the 21st of Nov., there were, in effect, but three terms in which it depended.

I have seen an authentic report (*c c*) of Mr. Noy, lent me by my brother Brown, wherein, after the arguments of Stephens and Flemming in that case, are these words :—

Memorandum quod postea le case fuit adjudge pur le Countess de Warwick, vers la Reyne pur le reason de Stephens supra, quia ne besoyne, en fesance de title, de mentioner son pere ; mes tantum a dire que son pere fuit seisi, et il est heir ; come Fleming, solicitor dit a moy ; mes il oustre dit que Counsel le Reigne fuit fortement encontre ceo ; et de meme le opinion est le Seigneur Egerton, et 2 Chief Justices, putant, que si error soit port ceo judgment eust estre revers.

Viz. Coke, attorney, Flemming, Solicitor, Popham *et* Anderson.

And it appears by the record that a writ of error was brought.

The writ of error was brought in 8*vis Mich. retorn.* 5 Feb. Hil. 42 Eliz. ; and so was kept on foot by several continuances till the 10th of June following, which I observe that they were so careful in it, that the Lords were present, and attended it all the time, and did not suffer it to be discontinued all that day, being the 10th of June, Trin. 42 Eliz. ; the Attorney General appearing in person, *requisitus si ipse ulterius in præmissis ultra præfat. Hugo Boraston et Thomas Adams procedere velit, dicit.* " *Int. Record. Trin. 37 Eliz. Rot.* 199. *in quodam processu versus quemdam Ricardum Bishop, jus et titulus dictæ dominæ reginæ ad et in boscis vocat. Alton alias Clompton Wood, satis manifeste apparet ex judicio pro dictâ dominâ Reginâ ibidem nuper redd. Ideo idem attornat. dominæ Reginæ dicit, quod ipse usque præfat. Hugo Boraston et Tho. Adams pro dictâ dominâ Reginâ super errores præd. ulterius prosequi non*

(*cc*) A short note of other arguments in the case by Serjeant Glanville for the defendant, and Attorney General Coke for the Queen, is preserved in the Lansdowne collection of manuscripts in the British Museum, No. 1061. fol. 16. a. to which is added the following memorandum, confirmatory of Sir Orlando Bridgman's remarks, on the case :—" *Nota*, This case was de-
" cided afterwards against Coke,—
" that the daughter should inherit:
" and a writ of error was brought
" upon this: but because there was at
" the same time another case, *viz.*
" Welsh's case, adjudged also on this
" point against the Queen, upon
" which a writ of error was brought,
" and the judgment reversed; where-
" fore this land also was restored to
" the Queen. So that they did not
" proceed in the writ of error ; it
" was unnecessary, the Queen hav-
" ing the land by another course."

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vult." In the mean time the Queen recovered these very lands upon the title now in print in Alton Wood's case, against the judgment of the said Court of Exchequer; and, therefore, it was to no purpose to proceed upon this writ of error for the lands already recovered: but a *non vult prosequi* was entered. And the reason entered upon the record, "because the Queen had in the mean time recovered the lands by another title;" and upon the record of that case of Alton Wood, in print, you will find that the judgment against the Queen for Bishop was reversed 5 *Junii*, 42 Eliz.; and thereupon this *nol. pros.* entered the 10th of June, five days after. If that had not been reversed, they would have proceeded in this. So the *non pros.* was not in respect of the matter in law; and this case, being adjudged without argument at the bench, in the Exchequer Court, and the land enjoyed contrary to the title, and the judgment dashed by a writ of error so brought, and by such opinions of those learned persons, the authority of that judgment in itself is not great (*dd*).

It is true Hobby's case hath received some countenance of authority since, but *obiter* only, and in passage to other things. It was cited in Godfrey and Dixon's case; and my Lord Coke sets it down as law: but the reason he gives for it makes directly for me. "Because," saith he, "each of the brothers might by possibility have been heir to the father;" whereas in our case neither of the brethren could be heir to the father; so that if that case be made good by the authority of my Lord Coke, you must take it upon his reason, or otherwise the authority of his opinion must be taken against you in this case of attainder, as it is in the case of the alien.

Cro. Jac. 539. C. C. 8.

But, 2dly, the resemblance is not alike between Hobby's case and ours here. There was never an inheritable blood from the parents being aliens; there was an inheritable blood vested in the brethren before attainder, which is also another reason given by my Lord Coke. If the son had purchased land, and died, and his brother had inherited, and after the father had been attainted, the subsequent attainder would not have divested the land which was vested; by the same reason not the right of inheriting which was vested between them. If it corrupt not the blood *ab origine* in one case,—why shall it in the other? They

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(*dd*) In the case of the King *v.* Eaton, Hil. 2. Car. 1., the report of which, by Littleton, J. was not printed till 1683, Hobby's case was cited by Yelverton, J. as deciding "that the daughter should *not* be heir to her brother, because, in shewing herself to be his heir, she must mention her father, which bridge was broken down by the attainder, a circumstance not occurring in the principal case." Litt. Rep. 28.

were once inheritable, both to the father and mother; and after the attainder they are still inheritable to the mother *Commune vinculum unionis* remains.

In our case of an alien, the brothers draw no inheritable blood from either parent; and therefore, to make the case parallel to ours, it must be put that both parents were attainted, and so under an incapacity; and afterwards had two sons, and one purchased lands;—that his brother should be his heir. In which case there never was an inheritable blood from either parent; and in that case as yet there hath been no judgment, and such authorities as there are in it seem to be that in that case they shall not inherit one the other. In C. C. 8. it is said, "*some* have holden, that if a man after he be attainted have issue, two sons, one cannot be heir to the other:"—but there is a maternal blood by which they may inherit one to the other. If the case had been put by him, that both *father and mother* had been attainted, it may be supposed that he would have set down his opinion more positively.

3 Co. 41. Britton 15. Bracton 130.

It hath been urged that one brother cannot inherit the other in the capacity of heir of part of the mother, if by the attainder he be disabled to take as heir by his father's blood.

I must agree the case that the uncle on the part of the father who is attainted, though he shall not inherit the son, yet shall hinder the resort to the maternal line; for those who should have inherited on the father's line, and cannot by reason of his attainder, may hinder others from inheriting. But it stands not upon the same reason, that therefore a brother who had two bloods, and so two titles to inherit by, *a patre et matre*, shall be hindered from enjoying by the one, because he is disabled by the other. He is the same person who had both titles; so had not the uncle on the father's side; and it is no reason he should be a bar to himself. I confess I know no authority for this distinction, nor do I find any against it, where the corrupt blood and the pure inheritable blood concur in the same innocent person: but that the pure blood which remains may be sufficient to preserve the other which was once vested and incorporated with it, from being divested. But yet this reason is not mine alone. Bracton and Britton, who both held that a son born after the attainder of the father could not inherit the mother, yet held, if he were born before the attainder, he might still inherit the mother for the reason given by my Lord Coke. Because a pure blood (*sanguis duplicatus*, as they called it,) was once vested in the son, which was not divested by the father's attainder. I urge it not for the authority; for I hold the first, *viz.* that a son born after the father's attainder may not inherit the mother, to be no law, though Ogle's case is not

49 E. 3. 12. See Vol. III. fol. 73. F. H.

C. C. 187. 4 Ass. pl. 4.

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against it; but for the reason of their opinion in the latter case, which is law,—that the son born before the attainder may inherit the mother; 49 E. 3. 12. *quant tiel inheritance sur purchase per le party ne vient unques en descent de nul cepamount mes que il e primer purchasor, mes que leur branch de heirs de part le pere fault, il e reason que les heirs de part lemere le ont, pluistot que il serr eschete al seigneur.* Here it never came *al cepamount:* but remained in the same person who had both bloods *et de meme cep.*

But I do not pretend to impose this upon any man's judgment; I do it not upon my own; but only I enforce my Lord Coke's reason of Hobby's case; there was a pure blood vested between the brother and sister, which could not be divested by the subsequent attainder. If that reason be denied, I may with the greater authority, as I conceive, deny the law to be according to the judgment on Hobby's case, that the two sons of a person attaint shall inherit one the other; for truly it was a case *primæ impressionis*, and I think it to be no law; and that upon as great authority, I suppose, as that judgment is.

In Courtney's case, Michaelmas 35, 36 Eliz., which was referred to the two Chief Justices and Chief Baron, Egerton, attorney, and Coke, solicitor-general, the case concerned the cousins and collateral heirs of Edward Courtney, son of Henry Courtney, Marquess of Exeter, who was attainted,—whether they should inherit to Edward. But it was resolved that without an act of restitution the heirs collateral could not have inherited him, and that other heirs than lineal he could not have so long as that attainder stood in force; and thereupon the question grew, whether the act of restitution in that case, as it was penned, did extend only to the lineal heirs or not of Edward. That point concerned not only our case, but this resolution which I have mentioned.—That Edward, the son of a person attainted, could have no other heirs but lineal, which was the ground of the debate in that case, is directly contrary to Hobby's case, which makes the brother, who is a collateral and not a lineal heir, to inherit the brother. This was about three or four years before Hobby's case; and add to this that which I observed before,—that the same four persons, *viz.* the two Chief Justices, and Egerton, then Lord Chancellor, and formerly attorney-general, and Coke, attorney-general, and Fleming, solicitor-general, after the judgment in Hobby's case did declare their opinion against it, and directed the writ of error; and that it so continued till the Queen herself had recovered the very same land; and that cause particularly entered upon record as the cause of the discontinuance of the writ of error: and I think their opinion will have as much force as that judgment in the Exchequer to the contrary, by three Barons, without argument at the Bench.

C. pl. Cor. 241.

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The law is clear, that a person attainted, though pardoned, shall have none but lineal heirs born after his pardon. The same reason there is that his son, who hath no ancestral blood but what is corrupted, shall have none but lineal heirs also; and Stamford is express, that the son of a person attainted "*ne poet estre heir a luy ne a ascun auter ancest*;" he cannot be heir to his father, nor to any other ancestor; *ergo*, he cannot be heir to his brother, for he cannot be heir to his brother unless his brother be an ancestor. So that Stamford also is direct in point for me against that opinion in Hobby's case. And truly, if we consider the cases of attainder by the reason of our old books, we shall find that other disabilities or incapacities are but like paint upon cloth or glass which colour the superficies only; but attainder is like the dyeing of cloth or wool, which gives a tincture to and discolours the whole mass. So that our case of an alien and a person attaint are not to be made parallel.

Staun. 195; 13 H. 7. 17.

C. C. 159. Reg. 224.

Cases of attainder are to to be distinguished from other disabilities.

But then there was another objection made from hence upon Hobby's case,—that the case of an attainder puts a greater incapacity upon a family than that of an alien; and therefore, *a fortiore*, if the son of a person attaint may inherit his brother, a son of an alien may inherit his brother.

I conceive that neither in the one case or the other the brother may inherit. But yet the objection receives an answer from what hath been already said. If you look to their persons, there is much more respect to be had to the alien who had no natural ligeance than to a traitor who broke it,—to him who had no birthright than to him who forfeited it. But as to legal and political consideration it is otherwise. First, in respect of the person attainted himself. A person attainted is still an Englishman, and owes allegiance, which an alien of foreign extraction doth not, save only local, whilst he is here; and such a person attainted hath still, as to his life, a protection against all but the King and his justice. But, 2dly, in respect of the kindred (which is our case), there is much more respect to be had to the kindred of a person attaint than of an alien; the innocent kindred of a person attainted are all the King's natural subjects. Their relations, correspondences, and interests, are English, and therefore much more to be respected, as to the having and inheriting of lands here, than the kindred of an alien of foreign extraction; and therefore our law favours acts of restitution of blood more than it doth indenizations or acts of naturalization, as I have said before. But I have done with this case of a person attaint; I conceive it is no way parallel to the case of an alien.

The law favours acts of restitution of blood more than it doth endenizations or acts of naturalization.

The other authority which hath been cited was in the case

2 Cro. 539.

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Action of debt for arrears of rent reserved in a lease of lands granted by the naturalized son of an alien, made denizen by letters patent, will lie in favour of that son's heir, being his younger brother, born in England after the denization of their common parent; and this although the eldest son was naturalized after the death of the father, and after his younger brother was heir to the father.

of an alien. It is Godfrey and Dixon's case, P. 16 Jac., B. R. Roll. 374.

I must put the case at large:—

Cornelius Godfrey, an alien born in Flanders, had issue there Daniel, his eldest son. He and his wife and son Daniel came over into England. The father is made a denizen by letters patent; and afterwards had issue by the same wife, Cornelius his second son, and dies. Daniel the eldest son, by act of parliament, 5 November, 3 Jac. was naturalized,—purchaseth copyhold lands, parcel of the manor of Stepney, and leaseth, rendering rent, and dies without issue. Cornelius the second son, as heir to his brother, brought an action of debt for the arrear of rent; and adjudged it would lie. The words of the act of naturalization were in effect the same that are in our case:—"that Daniel should be at all times hereafter his Majesty's liege natural subject of England, and as free to all intents and purposes as if he had been born in England, and shall be from henceforth enabled to demand, challenge, have and enjoy lands, as heir to any of his ancestors lineal or collateral by reason of any descent, reversion, remainder, right, or title which after the first day of this present parliament shall descend, &c.," with other such words as are in this act of naturalization of John and George; but had not (no more than in these acts) any express words, that his cousins should be heirs to him, but only that he should be heir to them; which principally made the doubt in that case. But, as I have said before, it was agreed that when the act makes him a natural born subject, the consequent is, he shall have his lineal and collateral heirs; and if he may be heir to a collateral cousin, a collateral cousin may be heir to him.

2 Cr. 539.

The difference between our case and that of Godfrey and Dixon is apparent.

In our case Robert, the father of John and George, was an alien, and could not transmit any heritable blood to his sons; nor was he a legal ancestor unto them. He was in the law *tanquam persona non existens*, as it hath been phrased.

In Godfrey's case, the father being a denizen by letters patent, one of the sons being born in England after denization, and the other naturalized, which is the legal birth, the father was such an ancestor from whom both the brothers might draw an inheritable blood, and by consequence inherit one to the other. And it is no more in effect but an alien made denizen by letters patent hath afterwards two sons born in England;—there is no question but each may inherit to the land which the father purchased, and each may inherit one the other.

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Some difference hath been put between the cases, for that Daniel the eldest son was naturalized after the death of his father, and after his younger brother was heir to his father; and so, it is said, there was never inheritable blood between Daniel and his father so much as in fiction or relation.

This, I conceive, will be plainly cleared by considering the relation of an act of naturalization distinguished by times.

As to the relation of acts of naturalization.

1st, If the son be naturalized, or born in England, and after the father is indenizened, and purchaseth lands, it is clear that this naturalization being before the father was capable to transmit an inheritance, the son shall not inherit the father; for the father had no power to transmit an inheritable blood by his denization, but to his sons born after. Whether the law be the same if after the father is endenized, the son is by act of naturalization made a subject born from the time of his birthday by reason of the violent relation of the act of parliament, I will not now debate it, not being to our present business.

7 Co. 7. Calvin's case, 36 H. 8. Br. denizen, 9.

2dly, If the father and the son be both at once naturalized by act of parliament, and then the father purchaseth lands, it was the opinion on Godfrey's case, that the son shall inherit the father. The law will make a priority, though in the same act, according to the order of nature and the intent of the act.

Where more operations than one are intended by an act of parliament, the law will make a priority according to the order of nature, and the intent of the act.

3rdly, If the father be an Englishman, or naturalized, or made a denizen, (for it will be all one as to lineal succession) and have a son born beyond sea, an alien, and another after, born here,—the younger son is now heir apparent to his father, and must inherit by his death. But if the eldest son be naturalized, and the naturalization either by construction of the act, or by the express words (as it was in Godfrey's case, and as it is here in the acts of John and George Ramsey, and indeed is generally in acts of naturalization) be restrained to the time of passing the act, or the beginning of that session of parliament, the elder son that is so naturalized in the life of his father shall be heir at the time of his father's death, and not the younger brother. (*ee*) This every day's practice teacheth us in the acts of naturalization of persons born beyond seas;—they inherit their parents in the same degree as if born here.

In acts of naturalization the naturalization is generally restrained by express words to the time of passing the act, or to the beginning of that session of parliament.

C. C. 129.

If the father, alien, have a son born in England, and after the father is naturalized, this son born before shall inherit to him. The same reason it is where the son is naturalized in the lifetime of the father, as where the father is naturalized in the lifetime of the son; and it is observable the words in that act of Godfrey, and so in our cases, are to this effect:—"that he

(*ee*) See Fish *v.* Klein, 2 Merivale 431.

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should be from henceforth adjudged and taken as if he had been born in England, and enabled to make his resort and pedigree as heir to any ancestors;" but doth not say, as if he had been born in England, *the first of July* 1580, or *that day wherein he was born;* for then he must have been accounted as born before his father's denization, and so not inheritable; and so would contradict the meaning of the act, and the letter also, which intended he should have resort to the pedigree of his ancestors. And therefore the words, "as if he had been born in England," not mentioning the time when born, must admit this reasonable construction, as if he had been born at such a time when, if he had been born in England, he was capable to have inherited to his father; for otherwise if the father be made a denizen, and the son born before, he after naturalized in his lifetime; the act of naturalization extending to a time precedent to the father's denization would be of no force as to the inheriting his father; which no man ever yet said; or, at least, the words "as if he had been born in England" must have this construction,—as if he had been in England when the act passed;—that is, as if he had been born naturally when he was born civilly. Make which of these constructions you will (one of them must be made), yet the eldest son naturalized shall inherit the denizen father before the younger son born here.

C. 129. C. C. 8.

But, 4thly, To come home to the case of Godfrey. The father alien, having a son born beyond sea, is denized, and hath issue another son, and purchaseth lands, and dies; the younger son is his heir; the elder son is afterwards naturalized with these relative words, "That he shall be at all times hereafter the King's liege subject, and be from henceforth adjudged and taken as if he were born in England, and enabled to make his resort and pedigree as heir to any ancestor, by reason of any descent, right, or title, which, after the first day of this parliament, shall descend or come to him."

Analogy between posthumous children, and children, alien born, naturalized after the endenization of their parents.

Under pardon, it is very clear he may, by virtue of this naturalization, be heir to, and make his resort to his father, though his father were dead before; for he is as a posthumous son, who, though the father be dead, may derive both title and pedigree from and through his father (*ff*).

Some of my brethren have taken the case as if it were urged that Daniel Godfrey's naturalization reached to the time of his birth. If it were so, I must agree they made a right conclusion; for then Daniel was, as if he were born before his father were endenized, and could not inherit him: but there is a posthumous son, as well by naturalization as by birth.

C. 139. C. C. 8.

(*ff*) Fish *v.* Klein, 2 Merivale, 430.

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Therefore, I can no way agree to that which was said, that there was never inheritable blood between Daniel Godfrey and his father, so much as in fiction or *relation*. If a man have issue a son, and dies, and after another son is born,—can it be said there was never any inheritable blood between them? Daniel hath a civil birth given him by act of parliament, after the death of his father. The act saith, "That from thenceforth he shall be, and adjudged to be, his father's legal son, and inheritable to him."—Every man is estopped to say the contrary.

Whether he shall be immediately heir to his father, and by relation of the act immediately inherit and divest the estate purchased by the father, and descended to his younger brother, or may take it only after him, if he die without issue, as his brother will not be material to our case; for be it in one case or the other, both now draw an inheritable blood from the father, and through him may communicate it to one another. It is necessary that the line of communication, as I may call it, should be drawn through the father: but it is not necessary it should be drawn in the life-time of the father.

But yet, as to this point of relation, I shall deliver my opinion:—father and eldest son aliens, the father is endenized, purchaseth lands, hath issue a second son, and dies; now the second son is heir; then the elder is naturalized with these relative words, "from henceforth and hereafter, &c." I think this shall not relate to divest the estate vested in the younger brother: but it is restrained by the words of the act, "From henceforth and hereafter." He shall have the future benefit of heirship, not for the time past: but yet for the time to come, and for the estate to come, he that is naturalized shall be heir to his father.

Where the first son of a denizen is an alien, and the second son takes the father's lands as heir, and the first son is then naturalized with the relative words, "*from henceforth and hereafter*," &c. this shall not divest the estate vested in the younger brother; such words give the *future* benefit of heirship, not for the time past.

Suppose there had been a warranty annexed to the purchase, when the father purchased it; and the youngest son had inherited to him, and died; and the elder brother had inherited to him, and been impleaded; he must of necessity vouch to warranty as heir to his father, to whom the warranty was made, or else the warranty is lost; and I think it is clear, by the words of the Act of Naturalization, he may vouch as heir to his father, who was endenized, and is dead before. So here is, not only in relation but in reality, an inheritable legal blood between the father that was endenized, and dead, and the son who was naturalized. C. C. 11, 12.

5thly, If the father had been an Englishman, or naturalized, and died, and his land had descended to the younger son born

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in England, and after the elder son had been naturalized, as Daniel Godfrey, as John and George Ramsey here are; that is, "that he shall hereafter and henceforth be a liege and natural subject, &c.," he shall not divest the estate vested in his younger brother. But yet, if the uncle had afterwards died, seised of lands, without issue, he should have been heir to the uncle, and make his pedigree through his father. It is true, in that case of Godfrey, he could not be heir to his uncle, because his father, through whom he was to derive his kindred, was but a denizen by patent, and could not transmit any blood but in the direct line. But suppose the father, alien, having an alien son after his denization, had had two younger sons, and died, and the elder of those was his heir; the youngest purchases lands, and the eldest son, the alien, is naturalized; I conceive it clear that he shall now inherit his youngest brother; for from the time of his naturalization he was heir to his father, and not the second brother, who was heir at his father's death. So that one shall be heir at one time, and the other at another time, by force of an act of parliament. And as a natural posthumous son draws a natural and inheritable blood from his father, who was dead before he was born, so doth a son who was naturalized after his father's death, and so had not a civil birth till then, draw and derive a legal and inheritable blood from his father; and that is the case of Godfrey and Dixon. The two sons by possibility might be heirs to the father, one to the other: but in our principal case John and George Ramsey could not by possibility be heirs to their father, and so could not be heirs one to the other.

So that I conceive, with some clearness, that the authority of Godfrey and Dixon's case makes nothing against me. Neither in truth do the *reasons* given in that case by the Judges make against me. That report of Justice Croke is somewhat too short; and sets down the reasons given by the counsel, not by the Judges. The reasons given by the Judges (as by the Justice Jones's Report, lent me by my brother Browne, (*gg*) appears) were, first, the difference between denization by letters patent, and naturalization by act.—2dly, The special words contained in the act of naturalization, which certainly were very effectual in that case (as in all others, where the defect was only in the person naturalized, not his ancestors,) the father was a denizen, and capable to be an ancestor, a legal ancestor to those descended from him; and it is expressly provided, that Daniel may make his resort to his ancestors. In our case the father was

(*gg*) There are other good reports of Godfrey *v.* Dixon, in the British Museum, *viz.* No. 30. Harg. MSS. fol. 9.; and No. 1112. Lansd. MSS. fol. 10.

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an alien; and John and George, the two brothers naturalized, being of alien extraction, could have no legal ancestor by the acts of naturalization, which cured their own defect of legiance, not their ancestors'.

And this may be one cause why in 10 Car. I. to encourage the Scots to plant in Ulster, they did expressly provide an act which naturalized all the *antenati*.

10 Car. 1. c. 4. in the Irish parliament.

And this, by the way, answers an objection, that, since the union of the two kingdoms, it may concern many considerable families of Scottish extraction, who enjoy their inheritances in peace. It concerns none in Ireland; I suppose there are none so concerned here in England, the law being so generally received, that the alienship of the father makes the sons not inheritable one to the other. And for particular families instanced at the bar, I have reason to believe that the case concerns them not; there is now no *antenatus* under sixty years old. It can concern but few of the Scottish nation for ever hereafter: but it will for ever concern the French and other nations. And there being in every parliament such multitudes of persons naturalized, as we see, and many of them in one and the same act of parliament, if there were ever reason for a strict construction of acts of naturalization, it concerns us now to make it.

And the rather also, for that our neighbours of France are very strict in their naturalizations; and allow none to be heir to those who are naturalized there but their children. It was the measure our ancestors took to deal with strangers of other nations, as they dealt with ours. It stands with the same justice and policy to do so still, in the privileges of aliens of foreign extraction. M. ch. 30.

I shall conclude this great point with one argument more, which I confess hath some force with me, though, perhaps, not with others.

This case concerns the King of the one side in a great prerogative, touching escheats in case of aliens denized and naturalized, dying without issue. The office of escheator was heretofore considerable; and the revenue by escheats being the principal of his office, reckoned a great branch of the revenue. Escheats, save only in respect of aliens, were very rare and inconsiderable. To hold up the rights and prerogatives of the King in point of revenue (whatever opinions are taken up) I have always held is the great interest of the people, who are necessitated, for their own safety, to supply what the King's revenue falls short of to answer the public charge. And, therefore, those rights which concern the King and people in

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general are to be preferred before the interests of particular subjects.

On the other side, in the consequence of this case on the plaintiff's part, none are concerned but aliens, or those whose ancestors are wholly of alien extraction. The Scots, if subjects, if not already, will be shortly, quite out of the case. There hath not been one instance given, notwithstanding the many hundred years wherein by reason of our alliances, and interests in foreign nations, particularly in France, it is probable the case hath often happened, that there have been two brothers of alien extraction, and the one hath purchased lands, and died without issue, that the other brother hath enjoyed the estate as heir. It hath been argued in express words by divers of my brethren who argued that this was a new case, and no authority in it, but what this case itself hath made, which was since this very verdict found.

I conclude this great point with this.

But in the very case of Godfrey and Dixon, there is express authority for me. Justice Doddridge, indeed, said, that if there be father and two sons aliens, and the two sons be naturalized, and not the father, he would deliver no opinion whether the brothers might inherit one the other. But the Chief Justice said, that if an alien had two sons born in England, which is the same case in effect with the other doubted, that such brothers shall not be heirs one to the other: *ad quod non fuit responsum.* So that the Chief Justice in effect resolved what Justice Doddridge doubted; and Justice Houghton not gainsaying, it was a tacit consent.

The great authority of Lord Coke.

For my Lord Coke's opinion, I must attribute more to it than to any single opinion of any one Judge. No one man hath deserved so well of the professors of the law; no one man in any human profession hath written so much, and with so few errors, as he, in those two works, which were published by himself in his life-time, and of which this of his Commentaries is one. And in this case his opinion is of the more weight, because he was himself a principal Counsel in Hobby's case, and published his Commentary upon Littleton after Godfrey and Dixon's case.

But I shall not further press the authority of his opinion in this case: but I may enforce it out of him, as the opinion of those times, even after Hobby's case, and Godfrey and Dixon's case, *that two sons of alien parents, born here or naturalized, shall not inherit one to the other;* and that appears also by the office mentioned in this special verdict, after the death of the Earl of Holderness, whereby the Commissioners and Jury took

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the law to be that George could not inherit to his brother John the Earl, and that therefore he died without heir.

In cases of public concernment, and not formerly resolved, but doubtful, we ought to interpret and declare the law, so as is most in favour of the King, *et pro bono publico*;—that is the reason, where the King is party, the array shall not be challenged for favour;—because in his allegiance every man ought to favour the King more than the party. And it is part of our oath which we take as Judges, according to the statute of 18 E. 3. that we shall do and procure the profit of the King and of his crown, in all things where we may reasonably do the same. Some of my brethren, who argued against my opinion, did say, this was a new and doubtful case;—*in dubiis presumendum pro rege*,—if any of them are still of that opinion that it is doubtful, they ought, for that cause, to concur with me in their judgment. And, therefore, it concerning in consequence the King and his revenue, by escheats by aliens, and, consequently, *bonum publicum*, on the one side,—and none but aliens, or such whose ancestors were wholly of alien extraction of the other side, these reasons have moved me to be of opinion in this point for the defendant, who claims under the King's title.

C. C. 15. b. 4 H. 7. 3. 22 E. 4. challenge 63. The King's revenue is for the public good; wherefore in doubtful cases the judges ought to interpret the law most in favour of the King.

I do not find in Bracton or Britton, though they purposely treat of successions and descents, nor in any other author of our books, this new land-mark of descents, of making a brother a *radix*, or *propositus*, or another root, or line of descent but from the parents; and both have *arborem communis sanguinitatis*:—or a distinction expressly made between a brother and an uncle to that purpose, and, therefore, I conceive it is but of a novel invention.

Britton, c. 119. de success. Bracton, 68.

In our principal case, if I have not given satisfaction, that the law is for the defendant; yet I have not in my own judgment, (by which, whether erroneous or not, I must stand or fall) received satisfaction that the law is for the plaintiff. So as to myself, this case comes within the compass of my oath, and within the reason of law which favours the King before any subject; much more before those of an alien extraction; and, therefore, supposing it to be a new and doubtful case, I ought to deliver, as I have done, my opinion for the defendant.

The second question in this case is, admitting (as I have argued) that if John Ramsay, and George Ramsay, had been born in England, of alien parents, they could not be heirs one to the other, whether the words in this act do naturalize them to a higher degree than if born in England.

And I hold it doth not.

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Wherein I shall say but a few words, for that I have borrowed already more time than is allotted me; and that my Lord Chief Baron and brother Twisden have agreed in this point with my brethren who argued for the defendant, and have delivered the reasons so fully, that I can add nothing; and my brother Atkins hath, if I mistake not, omitted this point; so that in this point the greater number is already for the defendant.

Construction of the acts of naturalization.

It appears by the whole scope of the acts of naturalization, that the intent thereof was, to put John and George in the same condition *as is they were born in England*, and no better. The title of it is, An Act of Naturalization, and no more. 1st, The act for George's naturalization saith, "He shall be adjudged and taken in every respect the King's liege subject, and as a person born within England." If he shall be taken in all respects as if he were born in England, he shall be taken in no respect better than if he were born in England. If you should construe the words of the act, as my brother of the Common Pleas did, that they shall be as free to prosecute, or defend, and enjoy the laws as any person born in England; and to make resort and pedigree from any ancestor lineal or collateral, as any person born in England, (though the words are not such;) yet it ought to have a reasonable intendment,—only to cure the defect of his own birth, and to make him as free as if he had been born in England, or as any other person so qualified,—*viz.* who had alien parents, and had been born in England, and not to make him in all respects as any person whatsoever, who had been born in England. Do you think he shall have the privilege of a nobleman, not to be sued by a *capias*, or to have a knight of his jury? yet he shall, if he must enjoy the privileges of any man born in England.

In order to break any rules of law or descent, by an act of naturalization, it must contain special provisions for that purpose.

3dly, It doth clearly seem to me, as my Lord Chief Baron said, that the words "as if they were born in England" are the governing clause both in the first and last sentence, and have an influence upon all the clauses that intervene; and to break the context, and to make any other construction of the intervening clauses, is to alter the scope of the act. The act intended to make him as if he had been born in England, but not to break any rules of law or descent for his sake; if it had, it shall be intended it would have made special provision for it.

4thly, That which induced some of my brethren to put so much stress upon the words of the act of naturalization was, because the Judges did so in Godfrey and Dixon's case. But that was, as I have already shewed, upon another reason. Before the act of naturalization of Daniel Godfrey, the father's

incapacity for want of birth was cured by his denization. He was a legal ancestor, if there could be a legal heir. That act cured the incapacity of Daniel, the alien son, for want of birth to be heir to his father. And so, consequently, he was inheritable to his brother, and his brother to him; and every clause of that act was of use to clear it.

It was observed by my brother Tyrrell, that whilst by construction of the act of naturalization you will make one brother heir to the other, you must make both inheritable to the father, which in Godfrey's case might, but in our case cannot be, the father *being still an alien.*

In our acts of naturalization, the son's personal incapacity of not being heir for want of birth, is cured: but the father's incapacity of being a legal ancestor still remains; and, therefore, the act hath no further influence on the son than to cure his own want of natural birth, and to make him be as if he were born in England.

The consequence of law distinguished from the consequence in fact, in argument.

5thly, As I have argued, acts of naturalization are to be taken strictly. If that ground should be allowed me, as I think it ought, yet it were an unreasonable and preposterous course, as hath been said, to expound the general words of this act to give more favour to a stranger, born of alien parents, and who still owes obedience to a foreign prince (for so it is in the rule, though not in this particular case) and whose obedience ties him to break his allegiance here, if they fall out to be contrary, than you will unto a natural born subject.

And so I conclude this point also.

I think that judgment ought to be given for the defendant.

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Hil. 12, 13 Car. 2. Rot. 1341.

(Writ of elegit was sued out upon a judgment obtained by *scire facias* against the conusee of a recognizance; and the conusee died before execution, yet the execution was good. As the statute creating the elegit has not made any provision concerning the abatement of it by the death of the defendant, it ought to be construed as other process of execution; which doth not abate by death, where the defendant hath no day in Court.

The clause in the writ of elegit commanding the extent to be upon warning of the defendant, and in his presence, is but a recommendation to the sheriff, not a precept to make the writ void if disobeyed.

If the execution had not been well made by reason of the decease of the defendant, it is absolutely void, not voidable only.

Special verdicts.)

Harg. MSS. No. 55. fol. 154.

Eject. firmæ by John Harwood against John Phillips, of 6 acres of meadow, 40 acres of pasture, and 10 of wood in Norton Bagot, upon the *demise* of James Silverlock. Upon a special verdict the Jury find,

That Thomas Coningsby, of Norton Bagot, and Thomas Coningsby, of North Mimms, May 2, 10 Car. 1., did acknowledge a recognizance in Chancery of 1000*l.* to the said James Silverlock, payable at the feast of the ascension that term; 20 Car. he sued out a *scire facias* directed to the sheriff of Middlesex, and a *nihil* returned; and an *alias scire facias*, and a *nihil* thereupon returned; and thereupon the conusee demanded judgment, and execution against the conusors of the said 1000*l.*, to be rendered unto him, by virtue of the said recognizance; and the defendants appeared not, but made default; and then default was recorded by the Court, and thereupon judgment is given that the plaintiff recover his debt against the defendant by default, and that he have execution against them; and that the plaintiff *elegit executionem de dicto debito levand. per breve dicti domini regis de, &c.;* that thereupon the plaintiff, 28 Nov. 1654, sued out a writ of *elegit* out of the Chancery upon the judgment aforesaid against Thomas Coningsby, of

(*a*) This case is cited in Keate *v.* Clopton, reported in the present Volume.

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Morton Bagot, whereby the Protector commanded the sheriff, quod omnia catalla præd. T. C., in ballivâ suâ, ad valentiam prædict. 1000*l.* per rationabile pretium inter, præter boves et afros de carucâ suâ, in præsentiâ dicti Thomæ, qui quidem Thomas Soret per ipsum vicecom. præmonitus, si præsens ibidem voluisset, præfato Jacobo aut suo certo attornato deliberari faceret; et si catalla præd. non sufficiunt in valorem prædict. 1000*l.*, tunc catalla præd. sic subtus valorem per rationabile pretium, nec non medietat. terrarum ipsius Thomæ Coningsby de Morton in ballivâ suâ, per extent., præfato Jacobo sive attornato suo similiter deliberari faceret, tenend. sibi et assignatis suis, ut liberum tenementum suum quousque præd. 1000*l.* inde plenariè leventur; et quod ipse fieri faceret inde scire faceret præfato Protectori in cancellariâ suâ præd. in 8vis Pur. Beatæ Mariæ tunc prox. seq., ubicunque tunc fuerit. Teste, &c. 28 Nov. 1654.

That thereupon, before the execution of the said writ 13 Dec. 1654, *præd. Thomas Coningsby obiit;* after whose death, *in præd. octavis Pur.* the sheriff returned an inquisition taken before him, 13 Jan., upon the said writ; and so finds the inquisition, whereby the lands in the declaration *(inter alia)* are found to be in the seizure of the said Thomas Coningsby, the recognizor; and that these lands in the declaration *(inter alia)* were delivered to James Silverlock, the plaintiff's lessor, as the moiety of the lands of the said Thomas Coningsby, *tenendum, &c. quousque, &c.;* and the Jury find a conveyance, whereby Thomas Coningsby, 4 Feb. 1650, for 199*l.* demised the said lands to the defendant for ninety-nine years, with a clause of redemption upon payment of 150*l.*; and finds the entry of Silverlock, the lessor of the plaintiff, 1 Oct. 1659; and his demise to the plaintiff *pro ut*, of the premises in the declaration; and the entry of the plaintiff; and that he was possessed *quousque*, the defendant John Phillips, afterwards, 1 Oct. 1659, upon 24 acres of pasture, with the appurtenances, then in the possession of the said John Phillips, *(videtur* it should be Harwood,) being parcel of the lands in the declaration specified, did enter and eject the said John Harwood from his farm aforesaid, in the said 24 acres, *modo et formâ pro ut; sed utrum, &c.* the defendant be guilty of the ejectment in the said

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24 acres, *juratores prædicti ignorant.*, &c.; and as to the residue, they find that the defendant is not guilty.

The question upon this special verdict was, whether as the defendant died after (*b*) the teste of the writ of elegit, and before the inquisition taken, whereupon the moiety was delivered, the execution of the writ was good? And two points made of it:—

First, Whether it might be legally executed after the death of the conusor?

Secondly, If it might not, whether it was only voidable by error, or void in itself?

See my argument at large that the execution was good; and so I delivered my opinion: but the case was adjudged when I was sick. Pasch. vel. Tr. 15 Car.

Argument at large. Harg. MSS. No. 57. fol. 220.

BRIDGMAN, C. J.

Ejectione firmæ by John Harwood against John Phillips upon a special verdict. The case was upon a recognizance in Chancery by Thomas Coningsby, and two *scire facias*, and returned *nihil.* Judgment is given that the plaintiff recover his debt, and have execution; and an elegit awarded, wherein the sheriff is commanded to deliver to the recognizee all the chattels of the recognizor, *præter boves et afros de carucâ*, to the value of the debt, by a reasonable price thereof in presence of the conusor; *qui quidem Thomas*, the reconusor, *foret per ipsum vicecomitem ad inde præmonitus si presens ibidem voluisset;* and if the chattels be not sufficient, then the chattels *sic subtus valorem per rationabile pretium*, and the moiety of his lands upon extent *deliberari faceret* to the recognizee *tenendum*, &c. After the teste of this writ, and before any extent, the recognizor dies; and after an inquisition is taken whereby the lands in question are extended and delivered to the lessor of the plaintiff, being the conusee. And whether this extent by virtue of this writ, it being returnable and filed duly, being made after the defendant's death, be good or no, is the general question.

I conceive the inquisitions, after the death of the cognizor, the elegit being issued before his death, is well found, and the execution good; and so the plaintiff, who is the lessee of the recognizee, ought to have judgment.

This case, if we pare off the excrescences, will be brought to a narrow room; and, therefore, to make plain my way, I shall say a little to them; the rather, because, if they have been insisted on in those arguments at the bar, which I heard, it was argued the last term when I was sick.

(*b*) The manuscript has *before* instead of *after* in this place.

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First, then, this case is upon an abatement of a writ of elegit, which is a judicial writ, and so not to be resembled to original writs, where the death of the defendant before judgment is generally an abatement of the writ; for the writ is the foundation of the action. And in cases where the action dies not with the person, if it concerns goods, an executor is concerned, and if lands, an heir is concerned. And so at the time of the judgment to be given another person, not mentioned in the writ, comes to be interested in the goods or lands; and the judgment to be given agrees not with the writ, and proceedings upon it; and, therefore, in such cases the law will abate the writ, and not give judgment. But, in case of a writ of execution well awarded, the interest is regularly bound from the time of the teste; and the death or other act of the defendant can make no alteration; neither doth it falsify any part of the writ, as I shall shew presently.

Distinction between writs judicial and original in respect of abatement at the death of the defendant. The latter generally abate if defendant die before judgment, the former are not affected by it.

Next question ariseth upon the death of the defendant, and not to be compared to cases of abatement upon the death of the plaintiff. Cleere and Vere's case, 11 Car. 1. B. R., hath been cited of all hands. Upon a recognizance in nature of a statute staple, the recognizor died after the writ of *extendi* awarded; and before inquisition taken it was adjudged that this extent made after the death of the conusee was merely void, against the opinion of Justice Crooke; and I conceive the law is accordingly: but I allow not the reason given, because the writ is, that he shall extend and seise into the King's hands, *ut ei, &c.;* and the sheriff hath not any warrant to deliver it to an executor or administrator; for a *liberate* might be afterwards sued out by the executor upon the return of the writ of extent. And a *capias ad satisfaciendum* is, *ad satisfaciendum* A. B. the plaintiff; and a *fieri facias* is, *fieri facias* so much *et illas habeas coram justiciarios, &c.* such a day *ad reddendum* A. B., which words are as specially applied to the plaintiff as the words *ut ei liberemus;* and yet, if the plaintiff die after the teste, and before the execution, the sheriff ought to execute the writ; and the return that the plaintiff was dead was not good as Justice Crooke puts it in Cleere and Vere's case, and is agreeable to common experience.

1 Cr. 450, 457.

1 Cr. 450.

But I take the true reason why an extent cannot be after the death of the plaintiff is because the plaintiff, by law, upon a Statute Staple, and also by a recognizance in Chancery by equity of the statute of Acton Burnell, if the land be extended too high, might upon the return of the writ pray that the extenders should have the land at the rate, and should pay the debt, which none but the plaintiff can pray and therefore if the writ of execution should not abate by his death, it might

Com. 82. Partridge *v.* Strange, and Carter 2 Cr. 12. Molineux and Laicon's case, 1 Jac. O. Ent. 597. C. C. 299.

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be prejudicial to him; which reason holds not upon the death of the defendant: but in cases of other writs of execution where no such collateral advantage is to be lost by the plaintiff's death, the execution after his death is good.

But now in the third place, to come home to our case, we are to consider what the law is in case the defendant die after a writ of execution taken forth, and before it be executed; and I conceive the execution is well made notwithstanding his death; and that as well touching lands as touching goods. To begin with a *fieri facias*, the law is clear that after a teste of a *fieri facias* an alienation of goods or chattels *bonâ fide* shall not hinder the execution. (*c*) So is Sir Gerard Fleetwood's case; and the books there cited are 3 Cr. 174.; for by the award of executions the goods are bound, (*c*) so that they may be taken in execution into whose hands soever they come. The reason is the same in case of death as where he aliens *bonâ fide;* for at the time of execution made they were the alienee's in one case, and the executor's in the other: but the goods being bound by the execution awarded, no alteration subsequent, in respect of the defendant, shall alter the case. And the authorities are in point that a *fieri facias* may be executed after the defendant's death. Vincent's case; judgment was against him for debt, and a *fieri facias* awarded. He dies; the execution is made upon the administrator. It is true, the administrator by a writ of error reverses the judgment; and a quære is made upon it, whether the administrator could bring a writ of error. But it is taken for granted that the execution was well made; for the error was not in the execution, but in the judgment; otherwise it should have been in *adjudicatione executionis:* but the error there for which it was reversed was for error in the judgment itself. And in Parke and Moses's case it was adjudged, in a recovery against Peirce, that a *fieri facias* awarded in his lifetime, and served upon his goods in the hands of his executor, was good. And so I take it in common experience upon a judgment in *ejectione firmæ* after an *habere fac. possessionem* taken out, the defendant dies; yet the execution may be made by the sheriff. The reasons of the law (which will also hold in our case) are these:—first, There is nothing appears upon record to falsify or contradict the writ; for it is *fieri facias de bonis et catallis* A. B.; that is, those which were his goods and chattels then, when the writ was awarded; *habere fac. possessionem suam termini sui prædicti ad huc venturam* (*ad huc* at the time of the teste) and the

8 Co. 171. 3 Cr. 174. Hil. 32 Eliz. C. B. 1 Cr. 494. 4 Car. B. R. Audley and Halsey's case.

6 E. 6. 76.

3 Cr. 181. P. 32 Eliz. B. R.

Upon a judgment in ejectment, if the defendant die after the writ of possession taken out, yet the execution may be made by the sheriffs. Executions are to be favoured.

(*c*) Now by the Statute of Frauds 29 Car. 2. c. 3. s. 16. the goods are not bound till the delivery of writ.

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like. Secondly, Executions, which are the life of the law, are to be favoured. The defendant had no day in Court, nor any thing was allowed him to plead to hinder the execution. If he have any puisne matter, he must sue his *audita querela*. And the third reason is, the sheriff ought to obey the writ. If he should return a *mortuus*, and in truth the party was not dead, the plaintiff could not traverse it; and therefore he is answerable upon such return, 32 H. 6. 28. In trespass upon the *capias* the sheriff cannot return a *mortuus*, but *non est inventus*; and so upon an exigent a *mortuus* is not good; for saith Prisot, the Chief Justice, it is better to put the executors to a writ of error than to suffer the sheriff to return that which may be false, to which no answer can be given. But a difference hath been taken between a *fieri facias habere possessionem*, and other writs which needed not to be returned and filed, and an elegit, which must be returned of record and filed. To that I answer, the necessity of returning one writ, and not the other, ariseth because by the act of West. 2. c. 18. an inquisition must be taken upon an elegit to appraise the goods, and extend the lands by jury, but alters not the law as to executions in the life or after the death of the defendant; and upon an elegit or extent upon a stat. the goods are bound by the writ sued out, as is agreed in Audley and Halsey's case, as well as upon a *fieri facias*. And, therefore, in Conways and Brandly's case, judgment in debt for 50*l.* was given against lessee for years; the plaintiff sued out an elegit; the defendant between the teste and return assigned it; and after the sheriff extended it; and the inquest found the value at 100*l.*; which the sheriff delivered to the plaintiff *tenendum ut bona et catalla sua propria in plenam satisfactionem debiti sui:* and adjudged a good execution. This was in an elegit; and, as I said before, the reason is the same in case of death as in the case of alienation *bonâ fide;* for in truth they were not the defendant's goods at the time of execution. So that as to goods, there is no difference between an execution by elegit, or by *fieri facias* upon the death of the defendant.

In trespass the sheriff cannot return a *mortuus*, but *non est inventus*. And upon an exigent a *mortuus* is not good.

4 Co. 74. Palmer's case.

1 Cr. 142. 4 Car. B. R. H. 11 Jac. C. B.

And the law is the same as to a writ of execution upon the lands, which bore *teste* before, and comes to be executed after the death of the defendant, as it is upon goods; and, therefore, in a writ of entry upon a common recovery, or other writ of entry, the *habere facias seisinam* being tested in the life of the tenant, may be executed after his death. That was Shelley's case: the 9th of October a recovery was suffered; the same day an *habere facias seisinam* was awarded; he died the same

As to goods, there is no difference between an execution by *elegit*, or by *fieri facias* upon the death of the defendant. A writ of execution upon lands, which bore teste in the life of the defendant may be executed after his death. 1 Co.

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day; the writ of seisin appears in the case to be executed after his death, and good enough.

Upon a statute staple, or recognizance of that nature, the process is to take the body, and to seize and appraise the goods, and extend the land of the defendant. I conceive he may return a *non est inventus* for the body, if he were alive at the teste, and to return an extent: but if a *mortuus* be returned, which supposeth him dead at the time of the writ, there is no further execution. But then an *alias extendi fac.* goes without any *scire facias* for the lands which he had *die recognitionis*, and the goods which he had *tempore mortis*: but yet, by the book, 13 Eliz. 299, it appears the executors of the conusee sued execution, and a *mortuus* returned, and yet an extent withal; which, if it be law, must be understood of a *mortuus* after the teste of the execution, though the book mentions it not; for otherwise it is against all the precedents; and against the reason and authority of law, which holds the execution void, if the defendant was dead at the teste of the writ.

N. Ent. 12. Samayne's case, 155. Bereblock's case. 16 H. 7. 6. appears to be accordingly. F. N. B. 267. d.

But upon a statute merchant a *capias* first issues; and upon a *non est inventus*, or *mortuus* returned, then without any *scire facias* an extent goes out; which I urge to shew that the death of the defendant did not at all retard the execution; and it is observable the statute *De Mercatoribus* was made the same year that the Statute West. 2. c. 18. The words of the statute *De Mercatoribus* are,—That after the quarter of the year all the lands and goods of the debtor shall be delivered to the merchant by a reasonable extent, to hold them until the debt is levied; and the statute 27 E. 3. of the staple, c. 9. refers to the Statute Merchant, and the statute of West. 2. which gives the *elegit* upon a judgment or recognizance, is the same. It gives the election of a *fi. fa.*, or *quod vicecomes liberet ei omnia catalla debitoris, exceptis bobus et afris carucæ, et medietatem terræ suæ quousque debitum fuerit levatum per rationabile pretium et extent.*

15 H. 7. 16. 36 H. 8. br. Stat. Merch. 43.

But it is true upon a recognizance or judgment, if either the party, plaintiff or defendant, die before the writ of execution, there must be a *scire facias*; because in those cases they are left to the rule of the common law; which required alteration of the process where there was alteration of the person; whereas the process in the case of a Statute Merchant, or Statute Staple, was by act of parliament.

C. M. ch. 471. and the books there cited upon West. 2. c. 45. Upon a recognisance, or judgment, if either the plaintiff or defendant die before the writ of execution, there must be a *scire facias*.

The use I make of all this is, that the *elegit* being made by statute, and the statute not having made any provision concerning the abatement of it by the death of the defendant, it ought to be construed as other process of execution, which,

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where the defendant hath no day in court, doth not abate by death.

There is one, and but one, great objection in this case: and that is, the writ of *elegit* is, *quod omnia catalla prædicti Thomæ per rationabile pretium, &c. in præsentiâ dicti Thomæ, qui quidem Thomas foret per te præmonitus, si presens ibidem voluisset, præfato Jacobo* (the plaintiff) *deliberari faceret;* and if they were not sufficient, then the goods and chattels *subtus valorem*, and the *medietatem terrarum ipsius Thomæ per extent. præfato Jacobo similiter deliberari faciat.* So the writ commanding the extent to be upon warning to the defendant, and in his presence,—how can that be obeyed, when he is dead before the extent?

This is an objection of great weight: but I shall give a double answer to it.—First, I say it may be reasonably construed that the *præmonitio* is not required to the lands, but only to the goods; for the words touching the lands are, that the goods *subtus valorem*, and the moiety of the lands for extent, *similiter deliberari faciat.* Now, there may be reasons why he should be present at the appraisement and delivery of the goods, which extends not to the lands, because there is an exception of *boves et afri de carucâ;* and the defendant alone knows which they were. And, secondly, the chattels might be delivered in satisfaction, before the return of the writ; and, though they be of 1,000*l.* value, he might have them in satisfaction of the debt of 100*l.*, unless the defendant pay down the money; and in our principal case it doth not appear there were any goods. I confess, I should have thought the word "*similiter*" ought reasonably to be understood *similiter* as the goods; that is, *præmonitus ne habita et in præsentiâ* of the defendant *si interesse voluerit.* But I find that both the Register, and F. N. B. in the writ of *elegit*, upon a recognizance in Chancery are,—tibi præcipimus quod catalla ipsius R. &c. per rationabilem appretiationem eorundem (not *pretium*) exceptis bobus et afris carucæ, in præsentiâ prædicti R. per te inde præmoniendi si interesse voluerit faciend., præfat. R. &c. facias liberari; et si catalla illa ad valentiam prædict. non sufficiant, tunc catalla illa, si minus valentia, per rationabilem appretiationem, ac etiam medietatem terræ ipsius R. in ballivâ tuâ per extent. *similiter* in presentiâ tuâ in formâ prædict. faciend., præfato R. facias liberari, &c.; that is, the inquisition for the land is *in præsentiâ tuâ*, that is, *vicecomitis*, and not *in præsentiâ* of the defendant.

Reg. 299. F. N. B. 26.

But I do not rely on this answer: the *elegit*, as it is issued out of Chancery, I am sure, is not agreeable with the Register: but it is in something nonsense. And whether the Register be

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misprinted, I know not. But I give the full answer, that the Statute W. 2. c. 18. gives the *elegit* alike *cum debitum fuit recuperatum*, and when it is *in curiâ regis recognitum, vel damna adjudicata*, in case of judgment, damages recovered, and recognizance.

In case of an *elegit* upon a judgment, or damages recovered in the Common Pleas, the writ runs,—*Quod liberet ei omnia catalla debitoris exceptis bobus et afris de carucâ, et medietat. terræ suæ quousque*, without that clause of *præmonitus*, or doing it in the presence of the defendant, as you may see it in the Register Judicial, fol. 56., for damages recovered in an assize; and the common constant practice is accordingly in all the Courts at Westminster. So it is also upon a judgment upon a recognisance in the Common Pleas, as appears in the Register Judicial, fol. 2., and upon a Testat. fol. 63.

225. Rot. 57.

The clause in the writ of *elegit*, of giving the defendant warning, and executing the writ in his presence, is but advice to the sheriff to inform him what is fit; not a precept to make the writ void, if disobeyed.

Now the Statute of West. 2. is the ground, as well for the *elegit* in the Chancery, as in the other Courts; and, therefore, this clause of giving the defendant warning, and executing the writ in his presence, is but direction to the sheriff to inform him what is fit, not coercive, to make the writ void if he do it not; for the writ is grounded upon the Statute of West. 2., which enjoins it not. Nor do other courts require any such warning; neither doth the sheriff ever return that he was warned, or that execution was in his presence; and, therefore, it is but an advice, not a precept to the sheriff; and comes in only by way of parenthesis.

The writ of *elegit*, after the death of the defendant, shall not be executed against an heir within age; but the parol shall demur if a *scire facias* be sued; and a writ of extent upon a statute is to extend *nisi alicui infra ætatem existenti per descensum hæreditarium descenderit.* If the sheriff extend the lands of an heir within age, it is void; for the statute 13 E. 1. *De Mercatoribus*, to which the Statute Staple refers, and the equity whereof reaches to an *elegit*, is expressly, that he shall have the lands of the heir, if he be of age, or when he shall be of full age, till he hath levied the debt. If the sheriff, in such case, extend the lands of such an heir, it is void; for he goes beyond his power; and he does more than it commanded him. But in process of execution, though the sheriff do not all that is commanded him, if the sheriff hath warrant to do what he doth, it is well enough for the party; and, therefore, upon a *capias ad satisfaciendum*, which seems conditional, though the

If the sheriff extend the lands of an heir within age, it is void. *Vide* C. C. 290.

5 Co. 90. In process of execution, though the sheriff do not all that is commanded him, if he have warrant to do what he doth, it is sufficient for the party.

Upon a *capias ad satisfaciendum*, though the writ be never returned, the execution is good.

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writ be never returned, the execution is good; otherwise, upon a *capias* in mesne process; and so it is, *fieri facias* with *de terris et catallis* A. B., *et illas habeas* such a day, *ad reddend.* G. the execution is good, though the writ be not returned.

16 H. 7. 6. Upon a statute staple the writ issued to take his body, and extend his lands and goods. The sheriff returned an extent of his lands, without mentioning his goods; and yet it was adjudged, the execution was good as to the party; for the defendant had no day to plead, nor any prejudice; and so in the principal case the law required no summons, nor notice to the defendant, nor his presence; and if he had been alive, the execution would not be avoided for his absence; and therefore I think the inquisition was well taken. And so is the writ of *elegit* well executed.

Another question was made,—Admitting the execution not well made—whether it was void or voidable? But this is by way of admittance of that against which I have argued; and therefore I shall say little to it. Yet I conceive, taking it for granted that the execution was not well made in respect of the death of the defendant, it is then absolutely void; for the writ was abated *in facto;* for, though it will excuse the sheriff, yet it will not make the execution good.

A recognizance is acknowledged,—the recognizor dies,—the conusee takes out an execution without a *scire facias* against the heir or terretenant. If they be ousted, they shall have an assize, which shews it is merely void. F. N. B. 267.

There is an objection in this case upon the verdict, which was not made at the bar, which hath stuck with me. Upon the return of the writ of *elegit* nothing appears to the contrary; and it shall *not* (*d*) be supposed but that the defendant was alive. The writ of *elegit* is, first, *quod liberet ei omnia catalla ad valentiam prædict. mille librarum:* and then follows, *et si catalla prædict. non sufficiunt in valore prædict. mille librarum, tunc catalla prædict. si subtus valorem nec non medietet. terrarum, liberari faciat.* So that the delivery of the lands is but conditional, &c., "if the goods be not sufficient." And the inquisition finds nothing touching the goods, as it is found in this verdict, which finds only the lands, and the delivery of the moiety of them to the plaintiff's lessor. F. N. B. 266. Reg. 299.

But to this I give a double answer:—

First, It is observable that the words of Westminster 2. are *quod liberet ei omnia catalla debitoris exceptis bobus et afris de caruca et medietatem terræ suæ quousque:* and they are the

(*d*) "Not" supplied by the Editor.

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same words as are in the Statute *De Mercatoribus*, and 27 E. 3. c. 9. of the Statute Staple; and the execution goes out joint there against goods and lands; and there are no words in the Statute of Westminster 2. that the land shall not be extended if the goods be sufficient. But it was the wisdom of the law, though they allowed that kind of proceeding amongst merchants for hasty payment of their debts, to take both goods and lands; yet a recognizance or judgment being records at common law, they made the exposition agreeable where it might be without prejudice to the course of common law, which was not to seize the lands; no, not in the King's case, whilst the goods were sufficient.

The course of the common law was not to seize the land for debt, even in the King's case, if the goods were sufficient.

If under a writ of *elegit* the sheriff shall return, "*nulla bona*," and extend the land, the extent is good, though in truth the goods were sufficient. If the sheriff make no return at all as touching the goods, it being but a directive clause which mentions goods in the writ of *elegit*, as to be taken first, *semble* that the execution as to the land is good.

But I take this clause, "*et si forte*," though in words conditional, to be but directive; for if the sheriff shall return "*nulla bona*," and so extend the land, the extent is good, though in truth he had goods sufficient; and no averment shall be against the sheriff's return. And by the same reason, if the sheriff make no return at all as touching the goods, it being but a directive clause, I conceive the execution as to the lands is good, though the sheriff might be amerced. And the book of 16 H. 7. 6. cited before, of the execution of a statute is a warrant to my opinion; for though there was no such conditional clause in the writ of execution of a Statute Staple as it is in *elegit*, yet the foundation of both writs was the same: but it is discretional.

In a verdict, the not finding of collateral matter shall be supplied *by intendment*. The law is favourable to verdicts, and will suppose the jury doubt of nothing but what relates to the matter in question before them.

But, secondly, I say in a verdict, the not finding of collateral matters shall be supplied; and the law, which is favourable to verdicts, will suppose the jury doubt of nothing but what relates to the matter in question before them. The question grew concerning the land; and therefore the jury found the inquisitions concerning the land, and meddled with nothing else.

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Tr. 13 Car. 2. Rol. 346.

(Where T. C., seised of certain lands in fee, acknowledged a Statute Staple to A. and H.; and the conusees, after his decease, sue out an extent on the statute during the minority of his heir; and in the writ of *extendi facias*, there are these words,—*nisi alicui hæredi infra ætatem existenti jure hæreditario descenderunt*, the execution of this extent being had *during the minority of the heir*, is absolutely void, although the heir consented to it,—and not voidable only. Construction of acts of parliament.)

BRIDGMAN, C.J.

Harg. MSS. No. 58, fol. 77. Ejectment.

Richard Keate brings an *ejectione firmæ* against John Clopton upon a lease by William Lucas, 3 Apr., 13 Car., for five years from the Annunciation then last past. The Jury find a special verdict. (*b*)

Upon the record the case is this:—Thomas Clopton, being seised in fee of the lands in question, 8 Junii, 14 Car. acknowledges a recognizance, in the nature of a Statute Staple, of 2000*l.* before the Lord Chief Justice Bramston, to Andrews and Hand. Afterwards, Tr. 16 Car., there is a judgment against him in the Common Pleas, for 200*l.* debt, and 3*l.* damages, at the suit of William Lucas, lessor of the plaintiff. Thomas Clopton, 20 July, 1650, dies, John the defendant, his son and heir, being within age, and not of the age of twenty-one years till 1658; the conusees of the recognizance, or statute after his death sue out an extent, and upon a *mortuus* returned take out another writ of extent, whereby the sheriff is commanded *per sacramentum proborum et legalium hominum, &c. per quos, &c.*, to extend as well all the lands which were the said Thomas Clopton's *tempore recog. ejusdem debiti, vel unquam postea, nisi alicui hæredi infra ætat. exist., jure hæreditario descenderunt, quam omnia bona et catalla, &c.* Upon which writ, amongst others, the lands in the declaration are extended; and upon a *liberate*, teste 18 Junii, 1651, delivered to the conusees, Andrews and Hand, 18 Aug. 1651. Then William Lucas, in p. 1657, takes out a *scire facias* against the terretenants upon the judgment suffered by Thomas Clopton, Tr. 16 Car. 1.; upon which John Clopton, son and heir, is returned terretenant, and appears. And in Michas. 12 Car. 2., William Lucas hath judgment against John Clopton, and upon an *elegit* hath the lands in the declaration delivered to him for a moiety; and he enters,

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(*a*) "Adjudged 10 Maii, 1666," MS. Harg. No. 58, fol. 76. In Carter's Reports, p. 18, it is stated that the resolution of the Court was delivered by Chief Justice Bridgman. The Roll contains a long entry of the case.

(*b*) In the manuscript the special verdict is set forth: but the case seems to be fully stated in argument.

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and leaseth to the plaintiff, who enters; and John Clopton, by the command of Andrews and Hand, the conusees, ejected him.

It appears here that John Clopton, the heir, consented to the extent upon the recognizance made by Andrews and Hand; for he enters, and ejects the plaintiff by this command. He had no title of his own to enter upon Lucas, who had the land in extent upon the subsequent judgment; and, therefore, his entry by their command could not be but in their right; and so, *quantum in se*, was a consent to, and admittance of the extent upon the statute to be good, and *in esse*.

And, therefore, the question is, whether this extent upon the recognizance in nature of a statute, being made upon the lands of the heir during his minority, and the writ of extent being with a *nisi*, (*nisi alicui hæredi infra ætat. exist. jure hæreditario descend.*) be totally void against the heir, and all others, so that the heir cannot admit or make it good, if he would, but that a stranger to the heir shall take advantage of the illegality and nullity of it, as if there were no such extent, though the heir consent unto it.

That this extent upon the recognizance, or statute, during the infancy of the heir, is void *primâ facie*, and in some degree, and not only voidable, cannot be well denied. In the case of a Statute Merchant, where the writ of extent hath the same words as here (*nisi alicui hæredi infra ætat. exist., &c. descenderit*) the sheriff extended the lands descended to an infant; and it was adjudged that an assize lay for the infant, as well against the sheriff himself, and his under-sheriff who did it by his command, as against the conusee; and the wife of the conusor who had been endowed by the heir, her dowry being extended, did also maintain the like assize. And though some of those authorities give the reason, because she was his wife, and dowable before the statute acknowledge; yet the law is the same where the statute was acknowledged before her intermarriage; the reversion being privileged by the minority of the heir.

Temp. E. 1. Ass. 402, 417. 12 E. 3. Exec. 77. 23 E. 3. 21. 18 E. 3. 33. 47 Ass. 4. *et* 49. C. C. 290.

The law is the same to this purpose, as I shall shew anon, between an extent upon a Statute Staple, or recognizance in nature of it, as it is upon a Statute Merchant. The extent upon the infant heir is so void, that he may bring an assize.

But by construction, or operation of law, an act or thing may be said to be void in several degrees. (*d*) It may be void by construction to all purposes as if it were never done, so that all persons may take advantage of it:—it may be void as to some person, or to some purposes only; as if it be pleaded,

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(*d*) "See my Reports 239, Austin and Gervase's case, and Hobart 77, compared together." Original note in the margin of the manuscript.

and not otherwise, &c.—An act, or thing may be so void, by operation of law, as that yet he, for whose benefit it is to have it made void, may yet, if he will, make it good; and if he do so, it shall be good as against him, and all other persons whatsoever; and in the mean time, *primâ facie*, it is void in construction of law as against all persons. Upon these heads divers instances may be given, which will be not necessary now to insist upon: but rather to examine under which of these degrees his case falls.

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An act or thing may, by construction of law, be void to all purposes as if it had never been, so that all persons may take advantage of it. It may be void as to some persons, or to some purpose only. It may so be void as that he, for whose benefit it is to have it made void, may, if he will, make it good; and if he do so, it shall be good as against him, and all other persons; and in the mean time it is void in construction of law as against all persons.

Upon the first opening of the case, I inclined to think that the heir, of full age, might consent to an extent during his infancy; and that it is not absolutely void against all persons; and so, as against Lucas, the lessor of the plaintiff, if the heir, whose land is extended, submits unto it, it may seem to be not without the countenance of reason. For, first, *quilibet potest renunciare juri pro se introducto*, this provision in the writ, *not to extend lands descended to the infant*, was made for the benefit and good of the infant. And if he at his full age consent to the extent, and waive this advantage,—why should he be hindered? In Sir William Drury's case, where this rule is cited, a bond for appearance by the sheriff with one surety or two, not sufficient, is good, notwithstanding 23 H. 6. c. 10. requires more than one and sufficient sureties, and that any bond in any other form by the sheriff shall be void. But the words of the statute shall be construed more for direction than constraint.

10 Co. 131. Beaufoy's case.

In our case, the agreement to the extent had during the infancy, is so far from waiving an advantage, that it may seem rather to give him a great advantage, and prevent a great mischief. The extent in this case was at 200*l.* *per annum* for 2000*l.*; the *liberate* was in August 1651; and 1900*l.* of this 2000*l.*, by computation of time, was raised before the ejectment lease was sealed by Lucas, the lessor. If this extent be absolutely void whether the heir will or no, then the conusors or their executors might extend *de novo*, and no part of the 1900*l.* be discounted; and the heir put to play an after game for the profits received by the conusors upon the void extent; and if they be dead, as against the executors, he hath no remedy at all.

Money received under colour of a right, whether to be refunded, quære. The executor of one who receives money under colour of a right cannot be compelled to repay it.

So that is one mischief to an infant heir, that though the extenders have received the amount of their debt during his

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minority, they may extend *de novo* at his full age, if by agreement to the extent he cannot make it good.

Secondly, Though the writ of extent is, *nisi alicui hæredi infra ætat.*, yet, *multa quæ fieri non debent, facta valent:* so far at least as not to make a nullity, especially in the execution of writs, which the law favours. In Harwood and Phillip's case in this Court, whereas the writ of *elegit* upon a recognizance out of Chancery was to appraise the goods in *presentiâ* of the defendant, *qui quod Thomas foret parte præmonitus* (or as in the register, *parte præmuniendus) si interesse voluerit;* the defendant died after the teste, and before execution of the writ so that he could not be *præmonitus*, yet the execution was adjudged good; and the law is the same if the sheriff, though he were alive, did execute the writ without summoning him to be present. The words shall be taken as directions which, though not pursued, shall not make the execution void.

Hil. 12 & 13 Car. 2. Rol. 1241. 1 Br. Rep. 154, 8—220. (d) Reg. 299.

5 Co. Hoe's case.

So a *fieri facias, ita quod habeas denarios, &c.;* or a *capias ad satisfaciendum ita quod habeas corpus in cur., such a day*, which seems conditional, is well executed, though not returned. That case of Harwood and Phillips was stronger; for the *elegit* ran to deliver the goods *ad valentiam* of the debt, *et si forte catalla prædicta non sufficiunt in valore præd. mille librarum, tunc catalla prædicta sic subtus valorem, nec non medietatem terræ liberari faciat.* This was a condition precedent according to the letter of the writ, *before he should extend the land.* And it appears not whether the goods were sufficient to the value of the debt or not, yet the extent of the lands was good, admit he make no return at all touching the goods, as the book 16 H. 7. 6. puts it. And it may seem more reasonable here that the execution of the extent upon the lands of the heir within age, (notwithstanding the words of the writ,) should not be totally and absolutely void, for that the lands are found by the Jury, and not extended by the sheriff upon his own head. He hath no power by the writ to inquire of the age of the heir, or to inspect him; or to know whether land descended to him, or not. And the *liberate* (wherein this case differs from a Statute Merchant) upon which possession is delivered, hath no words of exception, *nisi alicui hæredi infra ætat., &c.;* but, generally, to deliver the land extended.

But, notwithstanding the objection, I am of opinion that this extent upon the infant is totally void; so that any stranger may take advantage of it. And I ground myself upon the difference

10 Co. 70, 76.

(d) The report of Harwood and Phillips is in p. 464, in this Volume. The references in the margin are by Mr. Umfreville to the manuscript in the British Museum, No. 55 and 57.

taken in the case of the Marshalsea, between an act done by one as a minister of justice, who hath no authority; and where he hath authority, but executes it but in part, or there is some error in the execution or the writ. When he hath no power or authority, it is merely void; as in the principal case there, an action of false imprisonment lay against the officers of the Marshalsea, for executing a writ in a case where that Court had no jurisdiction. (*e*) That the sheriff had no authority by the writ to extend these lands, descended to the infant heir, appears by the negative words, *nisi*, &c. And by the authorities cited before, assize or trespass lay against the sheriff himself for extending it. If the sheriff, notwithstanding the prohibition, had a power by law to extend upon the heir, he could not be liable for an assize or trespass, though punishable for a contempt in disobeying the directions of the writ.

Hob. 47. Cox and Barnesby's case. 6 Co. 53. Countess of Rutland's case.

But further to clear the point, that the sheriff had no authority to extend the infant's lands, we must go a little further than the words of the writ, to the statutes whereupon this process is grounded. The words of the recognisance or statute (according to the act of 23 H. 8. c. 6.) run,—"*Si defecero in solutione, currat super me, hæredes, et executores meos, pœna in statuto stapuli de debitis, &c. ordinat.*" and that statute of 23 H. 8., upon which it is grounded, gives the like process and execution in every point, degree, and condition, as hath been used upon any objection of the Statute Staple. So that both the recognisance itself, and the act of 23 H. 8., refers to the Statute of the Staple, 27 E. 3. c. 9.

That statute of 27 E. 3. provides, that the writ of extent shall be returned into Chancery; and thereupon due execution shall be made from day to day, in manner as is contained in the Statute Merchant.

The Statute Merchant, to which it refers, is 13 E. 1. *De Mercatoribus*; for the other of Acton Burnel reacheth not to lands. By that Statute of *Mercatoribus*, a *capias* is to issue against the debtor; and if a *non inventus* be returned, or if the be taken, and pay not the debt within a quarter of a year, his land shall be delivered to the conusee by reasonable extent: and *if the debtor die, the conusee shall have no authority* (so the words are) "*to take the body of his heir; but he shall have his land, as before is said, if he be of age, or when he shall be of full age,*" until he hath levied of the lands the amount ment and value of the debt. So that in both the cases of a Statute Staple, and a recognisance upon 23 H. 8., the process hath ever run as it did upon 13 E. 1. *De Mercatoribus, nisi alicui hæredi infra stat., &c.* Now these statutes were intro-

3 Co. 11. Sir W. Herbert's case.

(*e*) See p. 386, in this Volume, n. (*p*)

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ductive of a new law; for at the common law a common person upon a recognisance, or obligation of that nature, could not have execution of the lands against the conusor himself, much less against his heir, who is not bound by a recognisance as he is upon an obligation; the words in an obligation being, *obligo me et hæredes*, which are not upon a recognisance; and, therefore, neither hath the sheriff power to meddle with the lands, nor the Court to award other execution than is given by the statutes.

The words themselves of 13 E. 1., *De Mercatoribus*, seem to be express enough, that he shall have no authority to take his lands till he come of full age; for the words, "*no authority*," in reasonable construction ought to reach to the whole clause, so far as it concerns the infant heir. But, however, the matter itself makes it clear: the statute saith, "*He shall have his lands if he be of age, or when he is of full age.*" He could not have at all meddled with them before that statute; and therefore it is *affirmativa negans*, as much as if the act had said, *he shall not have the lands if the heir be within age;* and the words, *nisi hæredi infra ætat. exist. descenderunt*, being ever since that time put into the writ are a clear evidence; it was so construed.

There will be a great difference, therefore, between writs founded upon a general authority, whether given by the common or statute law. They may have restrictive, or limited, or conditional clauses in them, which may be directive, and if not pursued may be cause of amerciament, or punishment to the officer who disobeys, but shall not make void the execution of the writ in other things, as in the case of *elegit* put before upon the Statute West. 2. c. 18. That statute did not command, that no execution should be of the lands, if the goods were sufficient; and, therefore, that clause in the writ, *et si forte catalla non sufficiunt*, &c. was but directive, grounded upon the reason of the common law, not the letter of the statute. And so in the cases of the *capias*, and *fieri fucias*, not returned, and other like cases, the sheriff's power was general, and given him by the common law, and not restrained by negative words. But where the power, or authority itself is originally limited or restrained by the act of parliament, whatsoever is beyond that is void, as without any authority whatsoever. By the statute *De Mercatoribus* it is enacted, That the "body of the debtor shall be taken, if he be lay," and the writ is directed by the very statute, "*Quod corpus prædicti A. si laicus sit capias*, &c." (and so the writ runs in our very case here upon 23 H. 8.) This, as I said, is *affirmativa negans*, that if he be not lay, a *capias* shall not go against him. If the sheriff upon such a writ take a clergyman, because his autho-

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rity was grounded upon a statute, and the writ gave him a special power, "*si laicus sit*," an action of false imprisonment will lie against the sheriff, which is a much stronger case than ours; for there was but an implied prohibition in the writ: but the writ here is in the negative, and an express prohibition, "*nisi alicui hæredi*," &c.

Hob. 47.

In Cox and Barnesby's case, upon an *elegit*, ancient demesne land was extended. Admitting it was not extendible, yet it is the opinion of my Lord Hobart, and I think good law, that the defendant could not enter; for it was but avoidable by *audita querela* at most. Neither is the sheriff, or he that receives possession, subject to an action of trespass, as if it were a nullity; for the *elegit* did warrant extending and delivering half his land: and the ancient demesne is his land as well as the other. And so, if upon a judgment against the ancestor a *scire facias* goes out, which is generally *terrarum tenentibus*, and an infant is returned tenant, and judgment is against him by default, a general *elegit* shall issue. And in such case, though the extent against the infant may be avoided by error, or *audita querela*, as the case requires, yet it is but voidable; for the Statute of West. 2. c. 18., which gave the *elegit*, hath no express words, *nisi alicui hæredi*, &c., nor is there any mention thereof in any of the writs: but it is avoidable only upon the reason of the common law, which, in debt against an heir, allowed him his age.

So the statute 51 E. 3. is, *Quod nulli distringas per averia carucæ quamdiu alia rationabilis districtio super ipsum fieri possit.* If such a distress be taken, it is not void, for it was good at common law; neither shall it be pleaded in bar to an avowry, but he is put to his action. But whereas the statute, West. 2., which gives the *elegit*, is, "*Quod vicecomes liberet ei omnia catalla debit. exceptis bobus et afris de carucâ;*" and the usual form of the writ is accordingly, "*Quod omnia bona et catalla præter boves et afros de carucis suis, et medietat. terræ, &c. per rationabile pretium, et extent. liberari faciat;*" if the sheriff in such case deliver *averia carucæ*, I hold that an action of trespass lies against him; for both the statute and the writ except them; so that the sheriff hath no authority in such case. And so it is in our case, both the statute and the writ, except the lands descended to an infant out of the power of the sheriff.

P. Ent. 261.

And so now in construction of law it is no more than if, upon a writ of extent against A., the lands of B. are extended:—this extent is utterly void to all persons and purposes. It is so void that the stranger must bring his assize or action of trespass: but an *audita querela* he cannot bring, as the book of 6 R. 2. is; for that the sheriff hath no colour by the writ to

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6 R. 2. ass. 69. and *audita querela*, 6.

deliver his land. It may be raised as an objection against me, that the heir in such case may have an *audita querela*.—4 Eliz. Moor's Reports. Upon an extent the sheriff returned the conusor dead, and that he had extended a rent; the heir within age brought an *audita querela*. It is held by Dyer that the writ will lie; for his death appearing by the return, the infant shall be aided by *audita querela*; or otherwise the extent shall be void, because it was made upon the possession of the infant. —So are the words of the book, which incline rather that it shall be void than that an *audita querela* will lie. And the extent was clearly void in that case; for the conusor being dead at the teste of the writ, upon a *mortuus* returned the sheriff ought to have gone no further: but an *alias extendi* ought to have issued. But admit an *audita querela* did lie for the stranger, where it did not lie for an estranger it will not alter the case; for the heir being a privy in blood, as well as in respect of prejudice, may have an *audita querela* where an extent is void, though a stranger cannot; as if the money be paid upon a statute, and the statute delivered up and cancelled, and a forged statute made, he shall have an *audita querela*.

N. Ent. 12. Semayne's case, a. 155. Bearblock's case, 10 a. 13 Eliz. 199.

2 Cr. 85.

So the issue in tail may have an *audita querela* upon an extent of his land upon his father's statute. Sir John Ashburnham's case, Michaelmas, 3 Jac. B. R.; and yet the extent is void; and he may enter or have an assize, as is agreed in that case, and 18 E. 3. Ass. 77.

So that I hold this extent is purely void, as if it never had been, being done without authority;—as if upon a statute against J. S. I extend the lands of J. D., this will not hinder him who hath a judgment against J. D. to take the lands in execution.

And this answers the objection of the other side; for to the first,—*that he having already received* 1900*l. may extend again the whole statute*,—I answer, if it were so, it was the folly of the guardian of the infant to suffer one who hath no authority to receive the profits; (*e*) and the same objection might be made if the conusee without any extent at all had entered and received the profits, this should not have hindered him afterwards to sue out an extent:—no more here. But even in that case it may be questioned how far the conusee shall be estopped, or the profits discounted, if the heir take no other remedy for the profits before received upon the void extent, the payments and discounts upon statutes staple and recognizances upon 23 H. 8.

Unnecessary payments (under colour of right) upon statutes staple and recognizances upon 23 H. 8., are properly examinable in Chancery.

(*e*) It is added in Carter, as a point in the judgment, that "the guardian might bring an action of trespass for the infant for the mesne profits." p. 21.

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being properly examinable in Chancery, and equitable construction being made there.

And as to the second objection,—that *quilibet potest remittere juri pro se introducto*,—First, here is no right introduced for the heir by the statute 23 H. 8., or the 31 E. 1.: but that right is preserved which he had before the statute of 13 E. 1. *De Mercatoribus*. But, 2dly, if he could quit the right belonging to himself; yet when others come to be concerned in it, and to be prejudiced by his waiving, it comes too late; for Lucas, the lessor of the plaintiff, by extending upon his judgment before the heirs assent to this extent upon the statute, comes to be concerned; and he cannot be prejudiced by the relation of a future agreement amongst others.

And, in truth, this last reason moves me to be of an opinion, that, admitting that the extent upon the statute were not so absolutely void, but that the heir might have made it good, if only the heir and conusee had been concerned; yet, as this case is, he cannot avoid it after the time that Lucas had extended; for the execution by the conusees upon the statute, during the infancy, against the prohibition of the writ of extent *nisi alicui hæredi, &c.* was not only voidable, but certainly void, in some degree; and then Lucas' proceeding to an extent was lawful at the time of his extending the land; and the subsequent agreement of the heir to the former extent shall not relate to wrong him, who had done nothing but what he lawfully might do; and to make him to lose his cost, labour, and charges, and to delay him, and frustrate the benefit of his execution; for that were both against the rule of relations, and the reason of law.

As if a grant of a rent charge be made to a man and his heirs and the grantee dies, the heir may bring a writ of annuity; and so make it a personal inheritance whereof the wife is not dowable. But if she have brought her writ of dower (which she lawfully may, because it was *prima facie* a rent-charge); now the heir, to the prejudice of the wife who had brought her lawful action, cannot make it his election to have it an annuity. So here admit the heir might have made the extent good which was executed during his minority; yet it being *primâ facie* void, and Lucas having lawfully taken out process of execution upon his judgment, the heir cannot afterwards to his prejudice make an election in affirmance of the first extent.

C. C. 144. b. the case was, dower was brought of it by the wife against the heir himself, which is stronger.

There were several exceptions taken against the title of Lucas, the lessor of the plaintiff, found in the verdict; and it cannot be denied but the judgment against the heir upon the *scire facias* is erroneous; for he was when the *scire facias* issued an infant, and appeared by attorney: but he was of full age

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when the judgment was given upon default; but that judgment was but erroneous, not void, and must be avoided by him by error, or *audita querela*, as the case requires.

Secondly, Divers exceptions were taken as to the extent upon the *elegit*: but I think all those fall off in this,—that the verdict expressly finds that the lands by the inquisition found to be a moiety, and delivered to Lucas, are the same lands and tenements mentioned in the declaration; and so judgment is to be given for the plaintiff.

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Tr. 16 Car. 2. Rot. 1362.

(A., being lessee of Chapter lands for three lives, granted the premises to B. for ninety-nine years if the *cestui que vies*, or any of them, so long live; upon trust to permit him, A., to enjoy the premises for so much of the ninety-nine years as he should live; and after his decease to permit C., the wife of him the lessee, one of the *cestui que vies*, and the other *cestui que vies* successively, to enjoy the same for so many more of the years as they or either of them should live. B. entered, and afterwards A. entered, and being in possession, died. C. his wife then entered; and B. died intestate. C. afterwards surrendered the lands to the Chapter, and took a new lease for her own life and that of her son. Upon the death of C. and her son, before the expiration of the ninety-nine years' term, the Chapter enter, and grant a new lease;—The administratrix of B., the grantee of the ninety-nine years' term, claims the residue of the term.

Held by Sir Orlando Bridgman (*b*) that A. was a good tenant at will to his own grantee B.—that *B. was occupant* on the death of A.—that his term of ninety-nine years *was merged* in the freehold—that the entry of C. was too late to make her either tenant at will or occupant—that at B.'s death C. became occupant of the freehold—that her surrender to the Dean and Chapter and the new lease to her were good, and that the claim of the administratrix of B. was groundless.)

BRIDGMAN, C. J.

Harg. MSS. No. 58. fol. 67.

In *ejectione firmæ* of a house and lands in Fakenham, on the demise of Richard Cooksey, lessee of the Dean and Chapter of

(*a*) S. C. Carter 63, with the arguments of the other three Judges; and in 1 Siderf. 346. the case is reported in error: S. C. also in Lev. 202. and in 2 Keb. 148, 250 and 285. In the Hargrave Collection in the British Museum, No. 68. fol. 32. is an accurate note of what appears to be an argument of one of the counsel in this case.

(*b*) The case was decided against the opinion of the Chief Justice, it

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Worcester, the case upon the record is in effect this:—Sir Francis Egiock being lessee from the Dean and Chapter of Worcester, for the lives of Dame Elinor his wife, and Ann and Elizabeth his daughters, by indenture, 11 Jac. grants the premises to Dingley,—*Habendum* from the day of the date for ninety-nine years, if the three *cestuy que vies*, or any of them, should so long live; provided, and the indenture is declared to be made only upon trust, that Dingley should permit and suffer Sir Francis and his assigns to have, hold, and enjoy the premises, and to receive and take to his and their own use the rents and profits thereof, for so many of the ninety-nine years as he shall live; and from and immediately after his decease shall in like manner permit and suffer Dame Elinor and her assigns to have, &c. for so many more of the ninety-nine years as she shall live; and afterwards, upon like trust, for Ann and Elizabeth for so many more of the said years as they or either of them shall live.

It is found that Dingley entered, and afterwards Sir Francis entered, and November, 1622, being in possession thereof, died; and that after his death Dame Elinor *primo intravit*, and was seised or possessed *prout lex postulat;* and she being in possession *prout lex, &c.*, Dingley, 1623, *obiit intestat.*, and she afterwards surrendered and took a new lease 13 Car. 2. for her own life, and her son John's life, to them two;—whereupon livery was given.

That afterwards Dame Elinor and John died, and the Dean and Chapter, by their attorney, entered; and after demised to the plaintiff's lessor, John Cooksey, who entered and leased to the plaintiff; and that the defendant, by command of Elizabeth Egiock administratrix of Dingley, entered upon him.

The general question is, who shall be occupant when Sir Francis Egiock, who was tenant for the three lives, died? the consequence whereof is said to be this:—If Dame Elinor were occupant, then is the lease for ninety-nine years (derived out of the first lease for three lives) still in being, Elizabeth, one of the *cestuy que vies*, being still alive,—and so the Dean and Chapter's lease is void. But if Dingley were occupant, then is the lease for ninety-nine years in him drowned in the freehold for three lives, and then the defendant's entry upon the plaintiff by the command of Dingley's administratrix is not good; and then also Dame Elinor (being in possession when Dingley died, who was tenant for the three lives, by the

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being held by three Judges in the Common Pleas, and by the whole Court of King's Bench on a writ of error, that C. the wife of A. was occupant, and that the term of ninety-nine years was not merged.

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first occupancy after the death of Sir Francis) is become the second occupant, and so had power to surrender; and then the lease to her and her son was good; and they being dead, the new lease by the Dean and Chapter to the lessor of the plaintiff is good.

The sole point that was debated at the bar was this:—Sir Francis Egiock, tenant *pur auter vies*, leaseth to Dingley for years, and enters and holds as tenant at will, and dies, whereby the will determines, and the freehold is in abeyance,—whether Dingley shall be occupant *nolens volens*, or that Dame Elinor by her entry shall be occupant of the freehold.

The case so put is but this:—A tenant *pur auter vie* makes a lease to B. for years; B. leaseth at will to his lessor A., the tenant *pur auter vie*, who dies;—whether B. be occupant *nolens volens*, or another who after entered and occupied.

But, before I argue this point, it is necessary to make it to be the case; and therefore it is enquirable whether there be a tenant for will in the case; and what estate Sir Francis Egiock had by his entry, whether he was a disseisor, or a tenant at will, or at sufferance. For if he were a disseisor, then the point of occupancy is out of doors; for there is no re-entry by Dingley found in the special verdict during the life of Sir Francis; and so his estate for years being turned to a right, when Sir Francis died that estate could not be extinguished, nor could there be any occupancy, the estate by disseisin descending to the heir.

As to that, the case upon the verdict is this:—Sir Francis Egiock, being tenant for three other lives, by indenture leaseth to Dingley for ninety-nine years, if the three *cestuy que vies* or any of them live so long; "provided, and the indenture is declared to be only upon trust that Dingley shall peaceably permit and suffer Sir Francis and his assigns to have, hold, and enjoy the premises, and to receive and take to his and their own use and uses the rents and profits thereof, for and during so many of the said ninety-nine years as he shall live." And it is found "that Dingley entered, and was possessed; and that Sir Francis, *after the making that indenture, postea intravit*, and continued in the possession of the premises."

Upon which two things are to be considered,—

First, it is not found when Sir Francis entered—whether before or after Dingley's entry: and if before, then he cannot be tenant at will. But it shall be reasonably understood that he entered after Dingley's entry; for it is first found that Dingley, by virtue of the indenture, did enter, and was possessed; and Sir Francis Egiock's entry being after found (though not when) it shall be understood in a verdict to be after the other. And

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that appears to be the more clear, for that it is found that after his entry he continued in possession, and being in possession, died. But he could not have continued in possession till his death, by virtue of his entry after the indenture made, if Dingley's entry, by virtue of the indenture, had not been before his.

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The second is this:—It is not found that Sir Francis Egiock did enter or continue in possession, either by the licence or command precedent, or by the assent subsequent of Dingley. So that it rests merely upon the trust—whether this trust expressed in the indenture be sufficient to make a tenancy at will, or to warrant Sir Francis Egiock's entry, for entry; for if it do not, then Sir Francis is a disseisor.

Where A. grants lands to B. for years upon trust to permit him, A. to take the rents and profits to the use of him A.; and B. having entered, and A. afterwards entered on the lands; A. becomes tenant at will to B., not a disseisor.

In Winnington's case it is found by the verdict, "that Robert Winnington infeoffed Birkett upon condition to re-infeoff him for life, remainder to his son in fee; by force whereof Birkett was seised in fee *per quod quidem feofmenta* the feoffor Robert entered and took the profits *absque contradictione sive agreamento del feoffee.* It was resolved in that case, that "although the intention of the parties was, that Birkett the feoffee should let it to him for his life; yet his entry by tort, and taking the profits without the agreement of the feoffee, was a disseisin." And it may be urged here, that a trust is but matter of equity, and gives no estate; and an estate at will is an estate in law. Secondly, that the trust is not to lease or grant it to him, but to permit and suffer him to have and hold, &c. 2 Co. 59.

If a man covenant to permit and suffer another to have, hold, and occupy Black Acre *à die datus*, for life,—this is but a covenant, and no lease. And so the law will not expect any livery; and therefore he shall not be tenant at will by his entry. Tr. 5 Jac. B. R. between Tooker and Squire. And it hath been lately adjudged in this Court between Brady and Brady, that an action would lie upon an *assumpsit*, that plaintiff would permit defendant to have the use and occupation of such a close *quamdiu ambabus partibus placuerit*, that he would pay 20*l.* a year, for every year wherein he should have the use of the said close *ex permissione prædictâ.* For it is no lease at will, neither is the 20*l.* a-year or rent reserved; for then the *assumpsit* would not lie. And to that effect also is Dartnall and H. 15 & 16 Car. 2. C. B. MS. Rep. 387. (c)

(c) This reference is in the handwriting of the text of the manuscript in the British Museum: but the report referred to does not appear to be amongst those volumes to which the Editor has had access either in the Hargrave, or in other collections.

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15 H. 7. 3. 12 and 13 Keilwey. 9 H. 7. 26.

Morgan's case, 2 Cro. 598. And the old books are express, that before the Statute of uses the feoffor upon confidence could not avow for damage feasant, or maintain an action of trespass in his own name, which a tenant at will might do; and that an action of trespass or assize lay against him by the feoffees. And 17 H. 7., Keilwey 41, 42, and 47., according to the former opinions, it is resolved, that if one make a feoffment to his own use, and after the feoffee suffers him to receive the profits, yet he is not a tenant at will. And the case of a trust at this day, and of a use or confidence before the statute 27 H. 8., have the same reason.

To all these I answer,—That all that can be inferred from these cases of the feoffor upon confidence is, that though they tend to prove him (not a tenant at will, yet they prove him but) a tenant at sufferance, or *quasi* at sufferance, but not a disseisor, unless at the most if the feoffee will have it so, and not before. And the book 15 H. 7. 12. is express that the feoffor upon confidence or trust is not by his entry like another trespasser. He is not a disseisor, though he enter without express command or agreement of the feoffees or trustees, unless it be that he occupy maugre the feoffees—expressly against, and not only without their consents—which doth not appear in this case. And Winnington's case was of a feoffment upon condition, and not upon confidence or trust, and the feoffee hath the profits to his own use until failure of the condition; and, therefore, not like the case of a feoffment upon trust or confidence.

15 H. 7. 12. Feoffor in trust is not by his entry like another trespasser. He is not a disseisor unless he occupy expressly against the consent of the feoffee.

So that I hold Sir Francis Egiock shall not be taken as a disseisor.—Whether by his entry he be tenant at sufferance, or tenant at will, is the great doubt. To speak properly, no man is tenant at sufferance, but he who at first came in by lawful demise, and, after his estate ended, continueth the possession; and holdeth over by wrong. Such a one Sir Francis, by his entry upon Dingley his trustee, could not be; for he was never possessed of a particular estate determined. But there is a *quasi* tenancy at sufferance, which is sometimes termed a tenancy at sufferance, when a man enters and takes the profit of lands without any estate made to him, but by the connivance or not gainsaying of him who hath the right. As before the Statute of Uses the feoffee upon confidence suffered the feoffor to receive the profits, in that case of Keilwey it is agreed that he is a tenant at sufferance.

Tenant at sufferance, who is properly. Co. Litt. 57. Brook Tent. per copy, 15.

17 H. 7. Keilwey 47.

17 H. 7. Keilwey 41, 42, 47.

So in Powesly and Blackman's case, M. 20 Jac., B. R.—one mortgaged land to another on condition of payment of several sums of money by six years; and it is covenanted and

2 Cro. 660. Case of a mortgagor continuing in possession, and he was tenant at sufferance, not at will.

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Roll's Collection. (*d*)

agreed between them that the mortgagee should not take any profits of the land till failure of payment. In the printed case it is not determined, whether the mortgagor by occupying the land were a tenant at will or at sufferance. But I have seen a more perfect report (*e*) of it,—that it was resolved that he was a tenant at sufferance, and not at will.

Co. Litt. 271.

So if a man enter of his own wrong, and take the profits, claiming only as tenant at will or sufferance; though he cannot qualify his own wrong, yet the other may, and make him no disseisor, but a tenant at sufferance. And this is proved of 15 H. 7. before cited. And so 11 Ass. pl. 6. a man gives livery in a house, and removes from one chamber to another, and stays there, he is a tenant at sufferance and no disseisor.

Blunden and Baugh's case. See Viner. Ab. Disseisin (H) pl. 2. *Ed.*

Now, whether Sir Francis Egiock's entry after his lease to Dingley, his trustee, make him such a tenant at sufferance, or at will, as to this point of occupancy it will not alter the case; though in many other respects there is a great difference between them. For by his death (whether he were tenant at will or at sufferance,) there is *possessio vacua*, and Dingley's estate for years was never turned to a right: but he might have granted the same over, without an entry, as well in the one case as in the other.

There needs not that formality to make an estate at will as there doth to another estate at common law. Creation of a tenancy at will. Litt. sect. 70.

But yet I hold that Sir Francis Egiock was by his entry a good and lawful tenant at will, for there needs not that formality to make an estate at will, as there doth to another estate at common law. It is sufficient that there is an agreement of both parties, that he shall hold the land, and that he enter accordingly. This appears by Littleton's own case; "one makes a feoffment to another, and delivers him the deed without livery and seisin, he may enter into the land and occupy at will, because it is proved, by the words of the deed, that it is his will that the other should have the land."

In the case of Powesley and Blackman, if the words of the indenture of mortgage had been, as is usual, that the mortgagor shall enjoy the premises, or receive the rents and profits thereof till failure of payment, he had been tenant at will:

(*d*) The references in this case to "Roll's Coll.," here and in pages 495 and 496 are in the handwriting of the text of the manuscript. The books referred to seem to be different from the abridgment, and the reports. The case of Liblyn and Slack, page 495, was of a year not included in Roll's printed reports; and the Editor has not found the case in the abridgment. That of Lamb and Tresham, page 496, is mentioned in the abridgment, but on another point.

(*e*) "3 Calthorpe. Rep. 383, 865." Reference by Mr. Hargrave; but this volume appears not to have been delivered to the Trustees of the British Museum with the rest of Mr. Hargrave's manuscripts.

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Proviso in an indenture is the agreement of both parties.

but because the words were only in the negative,—that the mortgagee should not take the profits till failure, which sound only in covenant, it created no tenancy at will. In our case, not only the indenture is declared to be made upon trust that Sir Francis shall have, hold, and enjoy the premises: but it is *provided* (which in an indenture is the agreement of both parties) that Sir Francis shall have, hold, and enjoy the premises; —not only receive the rents and profits, but *have, hold, and enjoy the premises.* And, therefore, it differs from the cases before put of a feoffment upon confidence to his own use; where the feoffor hath an use indeed, but was not to meddle with the profits, but as they were delivered over to him. But even in the cases of a feoffment upon a confidence, or a trust, though the authority of the book of 15 H. 7. *per curiam*, after several debates, and of 17 H. 7. in Keilwey be great, yet Littleton, sect. 463, saith, that "when a feoffment is made upon confidence to perform the will of the feoffor, it shall be intended by the law, that the feoffor ought presently to occupy the lands at the will of his feoffees." "And so there is the like kind of privity between them, as if a man make a feoffment to others, and they immediately upon the feoffment, will and grant that their feoffor shall occupy the land at their will;" and, therefore, he held that "releases to such feoffor, occupying lands, shall be good enough, though not to the tenant at sufferance." Which case is by far stronger than our case; so that I hold that Sir Francis Egiock, by his entry, is tenant at will: wherein I have been the longer, because it hath not been before touched, and in my opinion was necessary to be cleared.

36 H. 8. Br. feoffment al. uses. 52.

Litt. sect. 461. Co. Litt. 270. b.

So that now I come to the point as it hath been debated. Sir Francis Egiock, being tenant *pur auter vie*, leaseth to Dingley for years, who enters, and demiseth to Sir Francis at will. Sir Francis, who now was both tenant *pur auter vie*, and at will, (but these two estates, Dingley's lease interposing, kept asunder) dies—Whether Dingley, the lessee, shall be occupant *nolens volens;* or the lady Egiock, who afterwards enters;—I hold that Dingley is occupant.

Occupancy.

The learning concerning occupancy is somewhat obscure in the old books; and we heard little of it, but at Moots, till after that time that, by the statute of 32 H. 8., and the several statutes of 1 & 13 Eliz., tenant in tail, baron and feme, and spiritual persons, were permitted to make leases for three lives. Since which time, and after the resolution in Ross's case, (which was Mich. 41 & 42 Eliz.) that a man might have an estate for his own, and two other men's lives, and the Dean and Chapter of Worcester's case, that such leases might be made by ecclesiastical persons, or tenants in tail, many such

17 E. 3. 48.
39 E. 3. 1.
27 Ass. pl. 31.
16 Eliz. 328.
28 H. 6. 4. *et* 28.

5 Co. 13.
6 Co. 37.

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leases have been made, and many cases of occupancy have risen: all which are in the later reports, and have already been cited; as Utty Dale's case; (*f*) Castle and Dod's case, 5 Jac.; Chamberlayne and Ewer's case, Trin. 10 Jac. B. R.; Skelliton and Haye's case, Mich. 17 Jac. B. R.; and some others. Our case differs from all these; and, therefore, I shall not mention them than where the resolutions went further than are in the printed reports of them, or than as they serve to illustrate, or the reason of them conduces to prove our case. But something must of necessity be opened for the better clearing of this point concerning the nature of this occupancy.

2 Cro. 200. Bulstrode, Part II. 11, 12, 13. 2 Cro. 554.

Occupancy explained.

Special occupancy is but *quasi* an occupancy.

There are two sorts of occupancy (besides that which they call special occupancy—when land is granted to one and his heirs, during the life of another;—which is but *quasi* an occupancy,) I say there are two sorts of occupancy. The one is, when, by the death of tenant *pur auter vie*, not only the freehold is in abeyance, but there is also a *possessio vacua;* and that there is no one that hath the possession of the land, as when an estate is made to A., during the life of B., and A. enters, and dies. Now the possession is in no person: but is, as it were, in abeyance, as well as the freehold. And in such case the estate is gained by entry; and when one enters as occupant, the pleading is, *intravit clamand. ut occupans.*

One sort of occupancy is where by the death of tenant *pur auter vie* not only the freehold is in abeyance, but there is also a *possessio vacua.*

In such case the estate is gained by entry.

The other is, when the freehold, by the death of the tenant, *pur auter vie*, is in abeyance, but the possession is in some other person. In that case the law casts the freehold upon that person who is in possession. As if tenant *pur auter vie*, makes a lease at will, or for years, and dies: the freehold is cast upon the lessee, and he is become occupant, *nolens volens;* at least till he waive it, and his estate for years or at will is drowned. And to this purpose there is no difference between a lease for years, derived out of the estate *pur auter vie*, and a lease for years paramount it. For if a lease be made for 99 years, and the lessee is in possession; and then the lessor grants the reversion to A. for the life of B.; and A. dies, living the *cestuy que vie*, the lessee for years shall be occupant, and his estate for years is drowned. And this was agreed *per curiam*, Mich. 10 Jac. B. B. in Chamberlayne and Ewer's case, which has been cited out of Bulstrode; but I have seen a report of it of a better hand (*g*); and there the case was put, that there being

The other is when the freehold is in abeyance, but the possession is in some other person.

In that case the law casts the freehold on the person in possession.

Waiver of occupancy.

Merger of estate for years or at will in an estate by occupancy.

Rolls Collect. (*h*)

(*f*) Uvedale's case, Cro. Eliz. 182.

(*g*) "In Brownlowe's Reports, in Rolls and Mason's case in C. B., by the Lord Coke, this was said to be Adam's case, 10 El.; and that the lessee was not occupant, nor his term drowned: but I think the Report is mistaken." Original note in the margin of the manuscript.

(*h*) Query. Roll. Ab. 151.—16. Viner 71. tit. Occupant (E) pl. 3.—But see p. 489, n. (*d*)

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Effect of fraud.

a long lease for years in being, the lessor by *covin* to destroy it makes a lease of the reversion to an old man, *pur auter vie*. It was agreed that, in law, by the old man's death, the lease for years was gone, the lessee becoming occupant: but in that case, because it was by *covin* of the lessor, as to him, though not as to a stranger; it was held that the lease for years is *in esse;* but otherwise, I conceive, *nolens volens*, it is gone.

And I hold it regularly true, that he who is lawfully in possession at the time of the death of the tenant *pur auter vie* shall be the occupant. As if lessee *pur auter vie* leaseth for years; and the lessee for years leaseth at will, and the lessee at will being in possession, the tenant *pur auter vie* dieth, living *cestuy que vie;* the tenant at will shall be the occupant, and the lease for years shall not be extinct; as was also adjudged in that case of Chamberlayne and Ewer.

2 Cro. 554. M. 17 Jac. B. R.

So in Skelliton and Hayes's case.—The case was,—Tenant *pur auter vie* leased at will, and dies; the lessee at will is occupant. That case goes further; that the tenant at will not declaring how he held, as occupant or otherwise—another enters as occupant; and it was adjudged that the lessee at will was occupant, without claiming as occupant. For, saith the book, he being in possession, the law casts the freehold upon him, unless he waives it; and it is not requisite that he claim as occupant, unless there be a disclaimer in it; for, being for his advantage, the law shall adjudge it in him as occupant. So are the words of the book. I cite it only to prove the difference that I put at first, betweeen an occupancy where the tenant *pur auter vie* dies, and there is *possessio plena;* and where there is *possessio vacua* upon his death—that, where there is one then in possession, the freehold is cast upon him without any claim. But this book may seem to be against me, in that it admits that he may waive the freehold, and that it shall be adjudged in him as occupant only for his advantage. But to that I answer, first, to that which I drive at (as the consequence upon these premises) that Dingley the lessee is occupant, it will be enough if I can make out that he was *primâ facie* occupant: for as nothing of his claiming as occupant, so nothing of his waiving the occupancy, appears in the case. But, secondly, I answer, That the opinion in Skelliton and Hayes's case, "That the lessee at will might waive the occupancy," is but by the by, and concludes not the principal case there; and I think it no law unless with this distinction:—the freehold being cast upon *him* by act in law, if an action be brought against him in a Court of Record upon a paramount title, to save damages he may disclaim, and so waive

Disclaimer by parol *in pais* and upon record distinguished.

it;—as the heir of a disseisor, upon whom the freehold is cast, may disclaim to save damages. But it is resolved in Butler and Baker's case, that where there will be an *avowry* of the tenancy of the *præcipe*, a freehold shall not be divested by parol in *pais:* so that, notwithstanding any such waiver, otherwise than upon record, the tenant at will is occupant in that case.

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3 Co. 26.

It was resolved in Chamberlayne and Ewer's case, that if lessee *pur auter vie* makes a lease for years, and dies, living *cestuy que vie*, that by the lessee for years being occupant, his lease was extinct. And, therefore, I conceive, that though he should after disclaim in a *præcipe* brought against him, yet his lease, being extinct by act in law, it shall never be revived. And in that case it was further resolved, that if tenant *pur auter vie* dies, and possession being void, J. S. first enters, and claims in the right of J. D., yet he himself shall be occupant; for the law vested the occupancy, first in him by entry, which could not be divested by the act of the party *in pais*. And so much is also warranted by that case, as it is reported by Bulstrode, That the tenants at will, under the lessee for years, claimed only at his will, and to his use; and yet were adjudged to be occupants, which shews that they could not waive it.

If lessee for years, becoming occupant, disclaim the estate by occupancy, it will not revive the estate for years.

And the ground and reason of occupancy, in my opinion, proves that he upon whom the freehold is cast cannot waive it but upon record, when it vests in the demandant by his disclaimer, and so no avowry of the freehold. The reason of occupancy I take to be this:—when a lease is made to A. for the life of B., and A. dies, the lessor against his grant or livery cannot have it; he had only a reversion after an estate for the life of B. The heir of A. could not have it, for it was not an estate descendible; nor his executor, for it was not testamentary. There was a necessity this estate shall be in some person, that if any man had a right paramount, he might bring his action, and upon whom the lord, or he in reversion might avow for his rent or services; and, therefore, the law imitates nature, and will have no vacuity, and so makes the first occupier tenant of the freehold. This is in case there be *possessio vacua;* and the same it is in reason where there is a lease for years in being. For put the case—there be a lessee for ninety-nine years, and the reversion is in A. for the life of B., and A. dies—the law will rather suffer the lease for years to be extinct, than to have the freehold in avowry; and he that hath the right paramount to be without a tenant against whom to bring his action; or the lord, or first lessor, not to have a tenant upon whom he may avow for his rent or services. The

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The law presumes that it is for the advantage of the lessee for years to have the freehold, against which presumption it admits no proof.

Co. Litt. 46. and the books there cited.

mischief is the same in both cases, and the law presumes that it is for the advantage of the lessee for years to have the freehold, against which presumption it admits no proof; no more than that the heir, who is barred by the warranty of a collateral ancestor, hath not a sufficient recompence descended unto him. For by the common law (the reason whereof is at ill the rule in case of occupancy) a freehold for life was better than a lease for one thousand years; for he being to be tenant, against whom the action was to be brought, had power over the whole estate. And the lessee for years, before the statute 21 H. 8. c. 25. could not falsify the recovery against the tenant for life. (*i*) For which causes, by act in law, the estate of freehold being cast upon the lessee for years by the death of tenant *pur auter vie*, his term, which is not compatible with the freehold, is extinct, and the act of law *nemini facit injuriam*. And if it should be in the power of lessee for years to waive it, and yet keep his possession, there would be no tenant of the freehold at all;—a thing which the law abhors, and would rather suffer a particular mischief than such an inconvenience.

So that, upon the grounds both of authority and reason, I conceive that he upon whom the freehold is cast, be he lessee for years or at will, at the death of tenant *pur auter vie*, shall be occupant of the freehold *nolens volens*: wherein I have been the larger because of the contrary opinion of some of my brethren.

But now upon the point we are debating—when Sir Francis Egiock, tenant *pur auter vie*, leaseth to Dingley for years, and Dingley leaseth to him at will, and Sir Francis dies, by his death the will is determined; and the freehold either is in abeyance, or settled in Dingley, the lessee for years. And upon these things, which I have premised, the question will be, whether the law will construe, that upon Sir Francis Egiock's death here is a *possessio vacua*, and then Dingley in our case being lessee for years, is not occupant, but the person which first actually enters; which was the lady Egiock; or that Dingley, the lessee for years, hath such a possession that the law casts the freehold upon him, and then he is occupant, and his lease extinct.

For clearing of this we must consider, when lessee for years makes a lease at will, and then lessee at will dies, what possession or interest is in the lessee for years. There is a pos-

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(*i*) In Carter, p. 65, the position, that "the ancient law for many respects did not allow leases for above forty years, till 21 H. 8." seems to have been reported erroneously as part of the argument of the Chief Justice. It is adopted in Viner 1806, p. 74, tit. Occupancy (H.) pl. 3.

session in law (when the possession of one is attributed to another,) as the possession of lessee for years is the possession of him in reversion, to make a *possessio fratris:* but that is another man's possession by law applied to my benefit, who am in the reversion, and comes not to our case, which is concerning a man's own possession: and yet this is sometimes called the actual possession of the reversioner, though improperly.

The possession of lessee for years is sometimes called the actual possession of the reversioner, though improperly.

But as to our purpose, there is a possession in law, and a possession in fact; as there is a frank tenement in the heir, when his ancestor dies seised before entry; and a frank tenement in fact, when the heir enters. (*k*) If a man bargains and sells lands for years, the bargainee hath by this a possession in law before and without entry or claim. And it is more than a possession in law: it is an actual possession to some purposes; for he hath such an estate that, before entry, he leaves the bargainor but a reversion, and may attorn to a grant of it, and hath an estate which by a release may be enlarged; which could not be if he had not to some purposes an actual possession. And this is the common experience of conveyances at this day; and so clear that in the case of Lyblin and Slack the Judges would not suffer it to be argued.

Possession in law and possession in fact distinguished.

Bargainee of lands for years before entry or claim hath an actual possession to some purposes. Roll's Coll. Mich. 13 Car. B. R. *inter Leblyn et Slack per cur.* Pasch. 4 Car. C. B. 1 Cro. 110. Iseham and Morris's case, 6th Resolution.

So if a man bargain and sell lands to another and his heirs by deed enrolled, without entry or claim, the freehold is in him; and he is a good tenant to the *præcipe* for a common recovery, as common experience proves. And so it is in case of a devise; the devisee is in without entry or claim. But yet neither the bargainee nor devisee could bring an action of trespass against a trespasser, if they had not an *actual* possession to that purpose. If tenant *pur auter vie* bargain and sell land for years, the bargainee, as I said, hath the possession before entry or claim: but it is to some purposes only a possession in law. He can bring no action of trespass before entry; and, there-

Devisee is in possession of lands without entry or claim; to some purposes.

If tenant *pur auter vie* bargain and sell land for years, the bargainee hath the possession before entry or claim: but to some purposes it is a possession in law only.

(*k*) Carter's Report attributes much more to the Chief Justice than this genuine text of the judgment warrants. There the passage ending in line 29 of this page stands thus:—"If a man bargains and sells lands, presently the bargainee hath actual possession. He may *surrender*, *assign*, *attorn*, and *release*; yet he cannot upon this possession bring a trespass; and so he hath no such actual possession, but the actual possession which gives him power to bring an action for the profits. I know no greater possession, though he had his foot still upon the land." Whatever may be the law as to the capacity of such bargainee to surrender, assign, or release his estate, the position forms no part of the true text.

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fore, if tenant *pur auter vie* die, I will not deliver any opinion, whether this bargainee, who had a possession in law, shall be occupant or no; or that the first enterer shall be occupant. But in that case admit the bargainee for years be occupant, yet, having not in truth been in *actual* possession, and so not able to maintain an action of trespass against another that enters, there may be more colour that he may waive it. So if tenant *pur auter vie* make a lease for years, remainder for years, lessee for years dies, and the tenant *pur auter vie* dies before the entry of him in the remainder for years, perhaps there may be an occupancy in the case, for there *possessio* was *vacua*.

If lessee for years assign it, the assignee, before his assignors have waived the possession, may surrender to the reversioner, Hil. 11 Car. B. R. Rot. 70. *inter Prame et Titler adj. sup. Demur.* for it was an actual estate in the lessee, severed from the reversion; and the assignee hath an actual estate before his entry, his assignor not being an ejector, Moor's Rep. 656. Yet if the assignor assign over the lease to another, before the first assignee enters, and covenant that he is possessed of the term, and that his second assignee shall enjoy it, and shall be saved harmless of all incumbrances, the first assignment, till his entry, is no breach of the covenant, as it was held, 8 Jac. C. B. between Lamb and Sir Lewis Tresham, in Roll's Collection. But in our case, when a tenant *pur auter vie* makes a lease for years, and the lessee for years enters, and makes a lease at will, and the lessee at will enters, and dies, the lessee for years hath, as I conceive, an actual possession to all purposes, as he had before he made the lease at will. For the lease at will being determined, he is in of his former possession, and, therefore, without any other actual entry, shall maintain an action against a trespasser; for the estate of the tenant at will was part of the estate of the tenant for years, and of his possession. And it hath been adjudged that if a lessee for years make a lease at will, and a stranger enter, the lessee for years shall have an *ejectione firmæ*, and an *ejectione firmæ* is *quasi* an action of trespass.

S. C. 2 Roll. Ab. 495. 20 Viner Ab. 127. Surrender (E) pl. 2. *Ed.*

Lessee for years enters and makes a lease at will, lessee at will enters and dies, lessee for years hath an actual possession to all purposes without any other actual entry. The lessor might lease to a stranger without entry upon a tenant at sufferance. An *ejectione firmæ* is *quasi an action of trespass.*

And herein there is a difference between a determination of an estate at will, and a determination of another particular estate. If a man make a lease for years, or *pur auter vie*, and the lease determines, and the lessee continues in possession, he is a tenant at sufferance, and holds by wrong: and yet no action of trespass lies before entry in fact (*l*). But if tenant at

Determination of an estate at will, and a determination of another particular estate differ.

(*l*) "Our old books did make the possession of tenant at will so much

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will continue after the will determined, an action of trespass lies against him without an entry: and, therefore, Litt. Sect. 71. if the tenant at will pull down houses, or fell trees, an action of trespass lies against him; for it is a determination of the will, and he is no tenant at sufferance. But this is to be understood if the will determine by the act of the tenant at will: but not if it determine by the act of law, by the death of the lessor, for then he is tenant at sufferance, 21 H. 7. 38.

Co.Litt. 57. b. 9 H. 7. 24. *per curiam.*

Litt. Sect. 71. Co.Litt. 57. a. and the books there cited.

So likewise an action of trespass lies for the lessor before entry, against a stranger, for an entry after a will determined. And, therefore, if lessee at will grants over the land, though it be a void grant, yet it is a determination of the will; and the lessor may bring an action of trespass against the grantee if he enter, without any entry made by the lessor at will (*m*). And so Littleton's case,—" if a man lets lands to another and his heirs, at the will of the lessor, if he die, the will is determined; and if the heir enter, the lessor shall have an action of trespass, *quare vi et armis*, before he hath made any entry, which proves he hath an actual possession."

Co. Litt. 57.a. *et confer* 22 E. 4. 5. 27 H. 6. 3. there cited, but do not prove it fully.

Litt. Sect. 82. Co. Litt. 62. b.

Co Litt. 62. b. express. 38 H. 6. 27. ac.

So that now, when Sir Francis Egiock, the tenant at will, died, Dingley had the possession both in law and in fact; such a possession that he may bring an action of trespass against any one who shall enter; and there being no *vacua possessio*, he must be the occupant upon the grounds I have formerly laid.

Secondly, if any stranger shall entitle himself to be occupant, he must enter *clamando ut occupans;* and if so, Dingley (as I have proved) might have brought his action of trespass against him: for he had right to the profits and possession; and so the other, by his entry and claiming as occupant, becomes a trespasser.

Besides, in this case, the occupancy which is pretended is to the possession, *primo intravit*, and not to the reversion expectant upon the estate for years.

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the possession of the lessor, that they held that by a disseisin the estate at will was determined; and that a copyholder, or other lessee at will, could not bring an action of trespass in his own name. And although the law was afterwards resolved in both cases to the contrary; yet it shews that a difference was taken between the possession of a lessee at will, in reference to the lessor, and the possession of a lessee for years or of other particular estate." Sir Orlando Bridgman's note.

Possession of the tenant at will by the old law.

(*n*) " For, as it is said by Bryan, C. J. 22. E. 4. 6. the occupation of the tenant at will is a matter merely between the persons of the lessor and lessee at will." Sir Orlando Bridgman's note.

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No man can be occupant by doing an injurious act.

An estate by disseisin may be turned into an estate by occupancy.

38 H. 6. 27, 28. 9 H. 6. 22. Co. Litt. 42. b. 276. a. 266. a. 2 Bulstrode, 12. *per* Williams *et* Croke. Co. Litt. 266.

Now occupancy is an estate created by law, and the act of law doth no man injury, and you cannot put me any case wherein a man shall be an occupant by doing an injurious act. He may be disseisor, by committing a trespass: but not an occupant; for an estate by occupancy is a lawful estate, and created by law. Indeed, an estate by disseisin may be turned into an estate by occupancy: but that is where he becomes occupant after disseisin, not by it. As if tenant *pur auter vie* is disseised, and after dies; now is the wrongful estate turned to an occupancy, *nolens volens*, for the occupancy purged the disseisin.

And I do not think there is any difference, whether the right or title to the good estate came to the disseisor precedent, as in the case where he in remainder disseises the tenant for life; or subsequent, the right being precedent to or paramount the disseisin. As if A. disseises B., and after the right of B. descends to A. (which is the ground of remitter) he is remitted. But where a ground of action and a defeasible possession come together, that difference may be useful, but is not to our present purpose.

If tenant for life be disseised, and release to the disseisor, it is a question whether the estate for life be not so extinguished that the reversioner may enter, notwithstanding Lord Coke's opinion, Co. Litt. 276. a.

It is said, if tenant for life be disseised, and release to the disseisor, his estate is not turned to an estate for life; which I agree, for it was the act of the party, not of the law, which brought it to him, as in our case. And in that case it is a question, notwithstanding the opinion of my Lord Coke, for which he cites no authority, whether the estate for life be not so extinguished that the reversioner may enter. And Fitzherbert, Abr. Discontin. 29. saith by the release of tenant for life the estate of the disseisor is not changed: but saith not that the estate for life is in continuance, not extinguished.

Where the entry of disseisee is congeable upon the disseisor, the tortious fee will be turned into a rightful particular estate, if the right of the freehold comes any way by act in law to the disseisor, though for a less estate. 38 H. 6. 27, 28. 19 H. 6. 28.

But regularly I hold, where one is disseised, so long as his entry is congeable upon the disseisor, if the right of the freehold comes any way by act in law to the disseisor, though for a less estate, his tortious fee is turned into a rightful particular estate.

Tenant *pur auter vie* makes a lease for years, and dies, the lessee for years is occupant.

I conclude this point, that by the death of Sir Francis Egiock, the tenant at will, Dingley, is become lessee for years in possession, as if there had been no tenancy at will; and so the case is in reason to be the same with that which was before put, and must be agreed for law. Tenant *pur auter vie*

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makes a lease for years, and dies, the lessee for years is undoubtedly occupant.

But there is a third thing in this case considerable, which was not mentioned at the bar, and that is, The agreement and trust by the indenture is, that from and immediately after the death of Sir Francis Egiock Dingley shall permit and suffer Lady Egiock to hold and enjoy the premises, &c. for so many of the years as she shall live, in the same words as it was for Sir Francis Egiock.

If these words make a tenancy at will to Sir Francis during his life,—why should not the same words make a tenancy at will to the lady after his death? And if she were tenant at will, then there is no necessity that Dingley should be the occupant; for then it is but the case which hath been before put. Lessee *pur auter vie* makes a lease for years, and the lessee for years makes a lease at will, and the tenant *pur auter vie* dies, the lessee for years shall not be the occupant, but the lessee at will.

A man may make a lease at will, to begin futurely; the lessee may enter at the future time, and be tenant at will.

To this I answer by granting first, that a man may make a lease at will to begin futurely as after the death of another, or after the determination of another's estate; as if I by deed, or parol, agree that you shall hold my land at will from Michaelmas next, or after J. S., who is tenant occupant, leaves it, I conceive this is a good agreement. And after that time he may enter, and be tenant at will; for it is the agreement of the parties that one should hold the land at the will of the other.

And, secondly, that, as in the case of Sir Francis, so in this case, the words are sufficient to create a tenancy at will to the lady. But here is the difference: Sir Francis was not tenant at will till his entry, no more than if I lease to you at will, you are not tenant at will till you enter. There is only a good foundation in the mean time for a tenancy at will by your entry. As if I lease to A. for twenty-one years, to begin presently, till he enter, he is not lessee for years. And the words of Littleton are emphatical. "If a man lease to another *habendum* at the *will* of the lessor *per force de quel il est* in possession, then he is called tenant at will." He must be in possession by entry before he is tenant at will. Sir Francis Egiock by his entry, which is expressly found by the verdict, was tenant at will.

If A. lease to B. at will, B. is not tenant at will, till entry.
If A. lease to B. for twenty-one years, to begin presently, B. is not lessee for years till he enter.
Litt. Sect. 68.

At the decease of a tenant at will, who is also tenant *pur auter vie*, he who is to is to take by

But now when Sir Francis died, immediately by his death the lady would not be tenant at will for two causes. The first is, she could not enter till after his death. An actual entry is required to make a tenant at will, be she never so forward to

take the estate by act of law will be prior in time to him who entry. The act of law takes effect *instanter*; the entry will leave an interval of time necessarily.

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enter, even as soon as his breath was out: yet, as in all motions there must be a succession of time, so there must be in this. Suppose my Lady Egiock had not been in the house, nor had entered of a year after his decease, (and the contrary appears not by the verdict which is only *primum intravit*, but mention not when)—shall the freehold be in abeyance all this time? And yet Dingley, if a stranger had entered (*clamando ut occupans* or otherwise) might have brought an action of trespass against him. And the rather also, for that this agreement for the Lady Egiock to hold at will after her husband's death was made during coverture, when she had no will of her own; and she was no party to the indenture, as her husband was. And every estate at will must be at the will of both parties; so that it was necessary that she should agree to it before she was tenant at will. But the act of the law operates *in instanti*. At the *instance* of Sir Francis Egiock's death Dingley was in possession, as I have proved before; and *eo instanti* was occupant.

When a deed or agreement is made for a tenancy at will, an alteration of the estate before an entry as tenant at will determines the will.

And, secondly, When a deed or agreement is made for a tenancy at will, an alteration of the estate before an entry as tenant at will determines the will. As if tenant for years makes a lease at will, or an agreement to hold at will, and, before entry of the lessee, surrenders his estate for years; the will is determined. And so here the law, as I have before argued, *eo instanti* that Sir Francis died, having made Dingley occupant, his estate for years is drowned; and there cannot be a tenancy at will under an estate determined. So that, though the words of the indenture, which was the foundation of Sir Francis Egiock's being tenant at will, are the same with those for the lady's being tenant at will; yet the entry of the one, and not the entry of the other time enough, and before the estate changed, makes the difference.

There is one objection more against this opinion that Dingley should be occupant; for his estate for years is charged with a trust for others, to hold the land, and receive the profits; and the law, which *nemini facit injuriam*, would do an injury to the *cestui que trust*, if his estate should be drowned *nolens volens*, and not give him power to waive it.

To this I answer (*n*)—

(*n*) In Carter's report of this part of the judgment, p. 67, the following passage is inserted which is not to be found in the manuscript: "A man conveys land in trust, and the trustee commits felony, these lands shall be forfeited, though he may have relief in equity;"—for the inferences, which have been drawn from this supposed dictum of the Chief Justice, and from the doctrine of the text, see 1 Bl. Rep. 142, 165. 1 Eden 201, 230. 1 Sanders on Uses and Trusts, 279., 3d ed.; and Mr. Fonblanque's note to the Treatise on Equity, Vol. II. p. 170., 3d ed.

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First, This is but an equitable argument. A trust is nothing in law; nor considered, in law, as assets or otherwise: and we are upon a question in law. If Dingley had actually surrendered his lease for years, it had been drowned; and there was no remedy at the common law, and the extinguishment by occupancy is tantamount.

Where lands held *pur auter vie* are leased for ninety-nine years if the *cestui que vie* so long live, an extinguishment of the lease for years by occupancy is tantamount to the effect of an actual surrender of that lease for years.

Secondly, If tenant *pur auter vie* grant a rent charge and die, the occupant shall hold it charged; and whether here in equity the occupant shall take it charged with a precedent trust or not, is proper for the Chancery to determine.

One objection is made that, if the Lady Egiock were not a tenant at will by her entry, she is a disseisoress, and so continued when Dingley died; and the right to Dingley's estate, be it to the freehold, or to the lease for ninety-nine years, is still in being during Elizabeth Egiock's life; and so the plaintiff, claiming under the dean and chapter's right, hath no cause of action.

But to this I answer—first, That it is not found that the Lady Egiock entered by disseisin; and, therefore, shall rather be presumed to enter by consent of Dingley. And the rather, because it was agreeable to the trust to which, by express words, his lease (and by equity the estate for life, if the lease be dissolved into it,) was subject, permitting her to receive the profits.

Secondly, Admit the lady were in fact a disseisor, yet, when Dingley died, the right of the estate *pur auter vie*, by act of law, falls upon the lady, who was then in possession: and (for the reasons before) her wrongful estate by disseisin is turned into a rightful estate *pur auter vie*, the law preferring a less estate by right than a greater by wrong.

But, thirdly, Admitting the Lady Egiock was a disseisoress, and so continued, when she takes an estate by indenture from the dean and chapter for two lives, the dean and chapter have the reversion, if not recontinued, yet a reversion by estoppel. And when the Lady Egiock and her son die, it appears that the dean and chapter entered, and after leased to the plaintiff's lessor. And this gives title to the plaintiff by reason of priority of possession against the defendant, whose entry is by title under Elizabeth Egiock the daughter, subsequent to the entry and lease of the dean and chapter, and doth not as heir to, or under, the Lady Egiock the disseisoress. And so admitting there was a disseisin, and that disseisin continuing, yet the plaintiff hath a better title than the defendant, and ought to recover.

I have done with the case. I hold that Sir Francis Egiock was a good tenant at will—that Dingley upon his death was

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occupant, and his lease for years drowned in the freehold—and that the Lady Egiock's entry came too late, either to be tenant at will, or occupant—and that the Lady Egiock being in possession when Dingley died (be it by agreement or tort) is by Dingley's death (and not before) become occupant of the freehold—and her surrender to the dean and chapter, and the new lease made to her, good—and that, the new lease being determined, the dean and chapter had power to lease unto the lessor of the plaintiff.

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Tr. 14 Car. 2. Rot. 2372. (*b*)

(Where a limitation was in a settlement made before marriage of A. to the use of trustees and their heirs until they should raise certain portionary sums of money, if not paid at a fixed time by A.; and the portions were not then paid; and the trustees permitted the assignees of A. to enter and take profits of the lands beyond the amount of the portions; still the trustees may afterwards enter and *hold over* to raise the portions.

Conveyance to the use of H. B. and his heirs, until he fail in paying so much money, and after to P. V.—H. M. failing in payment, becomes tenant at sufferance; he makes a lease for five years, and a release upon it; and the relessee enters; this turns the interest of P. V. to a right; a fine then levied of the lands by H. M. to the relessee, and non-claim for five years bars that right.

Construction of special verdict is to be liberal.)

BRIDGMAN, C. J.

Harg. MS. No. 58. fol. 86. *Eject. firmæ.*

In an *ejectione firmæ* by Thomas Thomason against Thomas Mackworth for 20 messuages, 200 *acr. terr.*, 150 *acr. prati.*, *et* 250 *acr. past.*, in Crouckell and Betton, upon the demise of Peter Venables, baron of Kinderton.—Upon the general issue a special verdict is found to this effect:—

That Humphrey Mackworth was seised in his demesne as of fee, of the lands in the declaration; and 14 Jul. 14 Car. 1, by indenture tripartite, between himself of the first part; the said Peter Venables, and others since deceased, of the second part; and Mary Vena-

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(*a*) "Adjudged 22 Junii, 1666, *pro querente* Harg. MS., No. 58, fol. 86. S. C. Carter 75.: but the report in Carter is extremely inaccurate.

(*b*) This number is copied from the manuscript, the roll not being yet restored to its place with the other records of the court.

bles, sister of Peter Venables, (with whom the said Humphrey Mackworth was to intermarry) of the third part; he did enfeoff the said Peter Venables, &c. and their heirs, of the premises (*inter alia*) to several uses. And the indenture is found *in hæc verba.*

Whereby there is a settlement of the manors and towns of Abbot Betton, Sutton, Betton Strange, and Croukhill, in the parishes of St. Julian's in Shrewsbury; Brace Meale, Ascham St. Chad, Berrington and Coleham; and all other his lands in the county of Salop, *viz.* of the Hall of Betton Strange, and the lands thereto belonging, and all other his lands in Betton Strange, and some other parcels in Abbots Betton and Sutton; to the use of Humphrey and Mary for their lives, and of the heirs of Humphrey for her jointure; and as to other particular lands in Abbots Betton, to the use of Humphrey for life, and after to his first son upon the body of Mary in tail, and so to the other sons of her; and for default of such issue, to the use of the said Humphrey Mackworth, his heirs and assigns; provided that if he should afterward settle other lands, by the consent of Peter Venables of 60*l. per annum*, upon the sons in manner aforesaid, then this settlement upon them to be void; and as to particular lands in Sutton and all other his lands in Sutton, and in Brace Meale, Coleham, St. Julians, and all the rest whereof no use before is limited, to the use of himself, his heirs and assigns, chargeable with the payment of 1000*l.* and other sums thereinafter limited to be paid in manner and form as the same is by these presents declared and appointed.

And there is a large settlement of the leases and estates of inheritance of Mary Venables, for the benefit of Humphrey and Mary, and their children; and there is a covenant by Humphrey Mackworth for him, his heirs, executors, &c. with Peter Venables, &c., if it happen the said Mary to die without issue male by him, having only one daughter living after the decease of Mary, to pay to the said Peter Venables, &c., and the survivor of them, and the executors of the survivor of them, within three months after the age of eighteen years of such daughter, 1000*l.* in trust, and as a portion for the said daughter; and another covenant that he, his

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heirs, executors, or administrators, shall and will within three months next after the birth of every child, be the same son or daughter, begotten by the said Humphrey upon the body of the said Mary, pay to the said Peter Venables, &c. a several sum of 100*l.* upon trust that the said Peter Venables, &c. shall dispose the same unto the use and profit of such child for whom the same was so paid; and if any such child happen to die before the said 100*l.*, with the increase thereof be paid, that the same shall be paid to the survivors of such children, &c.; and it is the true intent and meaning of all the said parties, and hereby declared, that if it happen such payment of the said 1000*l.*, and several sums of 100*l.*, or any of them, be not made according to the intent and meaning of these presents, that then these presents shall be and enure; and the said Peter Venables, &c. and their heirs, shall stand and be seised of all and singular the said manors, lands, and hereditaments, except such part thereof as are limited for the jointure of the said Mary, and so much thereof as are now in jointure to Dorothy mother of the said Humphrey, the premises limited to the use of the heirs male of the body of Humphrey upon the body of Mary, for and during the said respective estates only; and after the several determination of those several estates for all those messuages, lands, and premises also to the use of the said Peter Venables, and their heirs, until they have fully levied out of the rents, issues, and yearly revenues thereof, the said sum of 1000*l.*, and every of the sums of 100*l.* to be paid according to the true intent and meaning of these presents, with damages for non-payment thereof, according to the rate of 8*l. per cent.* to be computed unto the time that the said principal sums of 1000*l.* and 100*l.* can or may be levied as aforesaid; and from any time after the said sums of 1000*l.* and 100*l.* levied as aforesaid, then to the uses, intents, and purposes as these presents before mentioned and expressed, any thing in these presents contained to the contrary notwithstanding; with other usual covenants in the said indenture, that he is owner, and against incumbrances; and with a covenant by Humphrey Mackworth that he and his heirs shall and will stand and be seized of and in such part and so much of the premises as before the end of Michaelmas Term next

Usual covenants by the settler.

shall not be conveyed to the said Peter Venables, &c. to the several uses in and by these presents limited and declared.

And the jury further find that livery and seisin was executed by virtue of that indenture; and that Mary Venables likewise executed estates to the said Peter Venables, &c. to the uses limited in the said former indenture of her own lands.

And they further find the marriage; and that they had issue, Peter Mackworth, born Sept. 13, 1639, and Mary, born November 22, 1641; and they find that Humphrey, and Mary his wife, Thomas Mackworth his son and heir apparent, and Ann Buckley daughter and heir of Richard Buckley, by indenture July 10, 1652, did grant, bargain, and sell to Sir Robert Eyton and others the premises in the declaration (*inter alia*) for five years, by virtue whereof they were possessed.

And so possesssed July 20, 1652, an indenture tripartite was made between, &c. (the said parties) which is found *in hæc verba.*

In consideration of a marriage between Thomas Mackworth and Ann Buckley, and for the settling of the manors and lands of the said Humphrey and Anne as is thereinafter contained, the said Humphrey, Mary, and Thomas did grant, to and enfeoff the said Sir Robert Eyton, &c., and their heirs, of the manors of Betton Strange, and all their lands in Betton Strange, Abbots Betton, Crowkill, Sutton, Coleham, St. Julians, Berrington, Bracemeale, and Markle, without naming the particular places, (but not Betton, nor all his lands in Com. Salop,) to the several uses in that indenture, *vis.* to the use of Humphrey and his heirs till the marriage; and after as to all the premises in Betton Strange, and some other particulars, to the use of Anne Buckley for her jointure; and, after her decease, to the use of Thomas Mackworth for ninety-nine years, if he so long live, with remainder over. And as for the premises in Sutton, Abbots Betton, Crowkill, Bracemeale, Berrington, Coleham, and St. Julians, to the use of Humphrey Mackworth for his life; and after his decease, as to Sutton house and lands and some other parcels in Coleham, to the use of Mary, wife of Humphrey Mackworth, for the wife of Dorothy his mother, charged with 150*l.* *per annum.* to the said

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Dorothy; and after the decease of Dorothy, then of Sutton Hall and particular lands in Sutton of the yearly value of 150*l.* *per annum* to the use of Mary for her life for her jointure; and from and after the end of the several and respective particular estates before limited of all the premises in Sutton, Abbots Betton, Crowkill, Coleham, Bracemeale, Berrington, and St. Julians, to the use of the said Thomas Mackworth for ninety-nine years, if he so long live, with remainder over; and as to Mackleworth, and some other lands in Cheshire, to the use of trustees to be sold. And in the said indenture there is a settlement of the estate of Anne Buckley, to the use of herself for life, and after of Thomas Mackworth, &c. *prout per indenturam*: but find no seisin *virtute indenturæ*.

But they further find a fine with proclamations, in Michaelmas Term, 1653, by Humphrey Mackworth, Mary his wife, Thomas Mackworth, and Ann his wife, *de tenementis in formâ sequente, viz.* of the manors of Woore, &c. being the lands of Anne, and of lands in Sutton, Betton Strange, and Abbots Betton to Sir Robert Eyton; and they find that the premises in Betton Strange, Crowkill, and Abbots Betton, were and are of the yearly value of 120*l.* and that the 200*l.* payable upon the births (*b*) of Peter Mackworth and Mary his sister *nondum satisfactæ nec solutæ sunt;* and that the said lands of the said Anne Buckley are of the yearly value of 300*l.*; that Humphrey Mackworth, January 1, 1654, died; and that Thomas is his son and heir, and January 2, 1654, entered into the lands in question, and was possessed; and that Peter Venables (the other feoffees being found dead) Dec. 1, 13 Car. 2. at Crowkill, did demise to Thomas Thomason, the plaintiff, *prout;* and that he entered and was ejected by the defendant, &c. But whether the defendant be guilty *petunt advisamentum curiæ, &c.*

There have been some things stirred in this case, which came not to the end of it.—As, first, Whether, when Peter Venables enters, he shall hold till he have received not only the 100*l.* a-piece, but also the 1000*l.*; or that a *toties quotics* shall be implied, that he may enter as soon as they become due. If Peter Venables might enter at the time of the ejectment lease

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(*b*) "Note it is payable within three months after the birth."—Note in the handwriting of the manuscript text.

in the declaration, it is not material to this present suit how long he may retain.

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A limitation to the use of trustees and their heirs, till they have levied a certain sum of money, seems to be a fee simple.

Secondly, it was questioned what estate Peter Venables &c. should gain upon their entry, whether a fee or a chattel? The words are, "That the premises shall be to the use of them and their heirs, till they have levied, &c." So it seems to be a fee simple; and so it was agreed in Bosworth and Forard's case (*c*) by the Justices the last term, who were in other things of contrary opinions. But whether fee simple or chattel, it will be alike to the plaintiff, for either of them are sufficient for the maintenance of this action; yet something I shall have occasion to mention of this point anon, though not to resolve the question.

I shall, therefore, pass over them; and consider, first, the merits or matter of the case as it is in truth, and was intended upon the special verdict: and, secondly, upon the verdict as it is of record, whether it be imperfect, or what other alteration it hath made.

For the first, the case is this in effect:—Humphrey Mackworth, upon a marriage with Mary Venables, makes a feoffment by indenture to Peter Venables and others, to several uses mentioned in the indenture, *viz.* of part to him and Mary for jointure, of other part to him for life, and after to his first son by her in tail, and the reversion of that, and all the rest, to him and his heirs; and therein covenants with them to pay 1000*l.* if no issue male to their only daughter after Mary's death, within three months after her age of eighteen; and covenants also, within three months after the birth of every child, to pay to Peter Venables, and the rest of the trustees, a several sum of 100*l.* upon trust to dispose the same to the use and profit of such child. "And it is the meaning of the said parties, and so hereby declared, that if such payment be not made, then the feoffment shall lie, and the feoffees and their heirs shall stand seised of all the premises (except the part limited for jointure, and other particular estates, and of these also after those estates determined,) to the use of the said Peter Venables, &c. and their heirs, till they have fully levied out of the rents, issues, and yearly revenue, the said sum of 1000*l.*, and several sums of 100*l.* a-piece, with damages, &c., and after to the uses before-mentioned." Afterwards they have issue, Peter, born in 1639, and Mary, born 22 Nov. 1641; neither of the one hundred pounds is paid.

Then Humphrey, who continued in possession, in July 1652,

(*c*) In p. 167 of this Volume; and see the cases collected in Mr. Butler's note, Co. Litt. 290. b. n. 249. sect. VI.; and Supplement to Viner, Vol. III. tit. Devise (L. a.) sect. 2. n. 3. p. 264.

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upon a consideration of marriage of Thomas, his son, with Ann Buckley, and settling her estate (being a great estate) makes a lease and release of all, whereof this now in question is part; part thereof, after the marriage, to the use of Ann Buckley, for jointure, and after to Thomas for 99 years, if he so long live; and other part, being part of that now in question, *viz.* Crowkill, and other parts of Betton, but with additions in Abbots Betton and Betton Strange, to the use of Humphrey for life, with remainder to Mary for jointure; and after all the particular estates ended to the use of Thomas for 99 years, if he so long live, with remainder over.

Then Humphrey and his wife, and Thomas and Anne his wife, Michaelmas 1653, levy a fine of Betton, and not Crowkill, to the said use; and Humphrey died Jan. 1, 1654. Thomas Mackworth enters; neither of the 100*l.* a-piece is yet satisfied. The premises in the two Bettons and Crowkill are of the yearly value of 120*l.*; so that in the time of Humphrey, and since the time of Thomas, the 100*l.* a-piece might have been raised out of the profits.

The general question is, whether Peter Venables, &c. the trustees, not raising the money when it might be raised, may enter, and hold over against Thomas Mackworth and Ann his wife, who came in as purchasers.

It is urged that they cannot enter and hold over.

First, for that the monies might have been raised in the time of Humphrey himself, as well before the settlement upon Thomas his son, as after; and the law makes no difference upon a limitation by will, or by way of use in the expression, "till such a sum be paid," or "till such a sum might be paid." They are of the same signification, if there be a neglect or fault in him who should raise it.

The law makes no difference on a limitation by will, or by way of use, in the expressions "till such a sum *be* paid," and "till such a sum *might be* paid."

Secondly, That Thomas and his wife come in as purchasers for valuable consideration; and though he be a son, yet he take here as a purchaser, as in Sir Nicholas Strange's case.

Force of a precedent, qualified.

Thirdly, That Sir Andrew Corbett's case, whereupon the learning of holding over in such cases is grounded, was a case of the first impression, and shall not be extended. And the differences are notable between our case and that;—for, first, there the will was concealed from them who should have entered to levy the money; here Peter Venables and the other trustees are parties, and as conusant of the estate as Humphrey Mackworth.—2dly, There the heir by his entry was a wrongdoer; for he had no right to the possession; here Humphrey Mackworth had right to it by the limitation of the old use; which was said, but I do not agree to it, did not cease by nonpayment of the 100*l.* without entry or claims. So that it may

be objected that it was a negligence in the feoffees, not a wrong by Humphrey: and the lease and release, or fine, worked no wrong; for Humphrey might lawfully convey his estate, which was not determined. 3dly, In Corbett's case, the heir, as heir, received the profits; and it was reason he should not take advantage, and gain by his own wrong. But he is a purchaser *bona fide*, who came in by title; and it is no reason the laches of the trustees should prejudice him; especially when they might have entered into a great part of this last settlement during the life of Humphrey himself, and have raised the 100*l.* a-piece.

But, notwithstanding, I hold the entry of Peter Venables for non-payment of the 100*l.* is lawful.

To make this good, I hold it requisite to search little into the reason of law for *holding over* against the heir, or assignee, where the profits are unjustly withheld; for, though the kinds of limitation by wills, or by way of use, whereby estates shall cease, and others shall rise up on nonpayment of monies, are created by the Statutes of Uses and Wills, yet the reason of holding over in such cases is grounded upon the common law, and not upon any words in either of the statutes concerning uses or wills.

Although limitations by wills or by way of use for some estates to cease, and others to rise up, on nonpayment of sums of money, are created by the Statutes of Uses and of Wills,—the reason of holding over, when the money is not paid, is grounded on the common law, and not upon any words in either of the statutes concerning uses or wills.

The common law itself makes a difference between a limitation of a chattel estate for a term certain, and a limitation till such a sum be levied, or the like; where it is certain, in the commencement, continuance, and end, though the lessor, or his heir, or he that hath the next estate, enter upon him wrongfully, he shall not hold over, but is put to his remedy for the mesne profits. Nay, though it be a lawful eviction by act of law, or by a dower, or the like, yet he shall not hold over; and, therefore, whereas in F. N. B. 142., and some of our old books, it was held that guardian in chivalry might enter upon lessee for years, because he might hold over, the later authorities have resolved that, no not so much as in the King's case, the King or his assignee guardian, can enter upon the lessee for years during the wardship; for that lessee for years cannot hold over;—his term was certain, and cannot be extended.

Where a limitation is of a chattel estate for a term, where it is certain in the commencement and end, though the lessor or his heir, or he that hath the next estate, enter on the term wrongfully, he shall not hold over, but is put to his remedy for the mesne profits; and this is so, even if the eviction be lawful, as by a dowress, or the like. 6 H. 8. 6. Leases, 58. 4 Co. 82. Corbett's case.

And upon that reason it is I hold, if I have a common of estovers certain, to have ten cart loads of wood out of such a wood yearly, to burn in my house, if the owner do disturb me

Where common of estovers, or of pasture, or a corody, is certain, and the right is disturbed in one year, the remedy is by action for damages, not to take double in the next year. 27 H. 6. 10. 5 Co. 31. Coulter's case; where the former is cited.

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of my cart loads one year, I cannot the next year take twenty cart loads; for it was certain how much I should have, and in what time I should take it. I am put to my action for damages, and have not election to take so much more the next year. So of a corody, or common certain.

Where a grant is of 200 loads of faggots to be taken yearly out of all the lands of the grantor, if the grantee do not take them in one year, he cannot take them the next. But if by the grant the grantor is to cut them, and make them into faggots, and carry them to the house of the grantee, if the grantee be not paid the first year, he may have 400 faggots the next year.

M. 37 Eliz. B. R. Southwell and Wade's case, a difference was taken between a grant of a thing in *render* and *prendre*. There it was agreed, if I grant a man 200 loads of faggots yearly *percipiendos* out of all my lands, if the grantee do not take them in one year, he cannot take them the next. But if by the grant the grantor is to cut them, and make them into faggots, and carry them to the house of the grantee, so that the grantor is to do the first act, and so by consequence it is his in *render*, if the 200 faggots be not paid the first year, although by the grant he might distrain, and did not for it, yet he may have 400 faggots the next year; for otherwise the grantor by his own act might prejudice him. This authority is not against my opinion. He might distrain for the 400 faggots, and he was to be recompensed for them: but he could not take them. And so where the grantee is to take the faggots, and the other disturbs him, he may have his action for it, and his recompence: but if he should take the 400 faggots in one year, it might possibly destroy the wood, which cannot bear so great a fall in one year.

When the determination of the estate is uncertain, as if land be limited to one till such a debt be raised, or such a sum paid, then if the heir or reversioner hinder the raising of the money by taking the profits, he shall not take advantage of his own wrong; it is at the election of the grantee to bring his action, or to hold over. C. C. M. Ch. 91. 4 Co. 82. 15 H. 7. 15.

But when the determination of the estate in the limitation is uncertain and casual; as if land be limited to me till such a debt raised, or such a sum paid; there, if the heir or reversioner hinder me from raising the sum by taking the profits, he shall not take advantage of his own wrong. It is at my election either to bring my action, or to hold over, upon the very reason of the common law; therefore, whereas if the heir within ward, after a tender, marries himself without licence of the lord, the Statute of Merton provides, That *dominus tunc teneat terram ejus*, after his age of twenty-one years, *per tantum tempus quod inde possit habere duplicem valorem maritagii*, if the guardian enter and be ousted by the heir, though he may have an action for the forfeiture, and the statute speaketh not of holding the land over, yet he may hold over; and so, whereas by the Statute of West. 2. c. 1. tenant by *elegit* is to hold *quousque debitum fuerat levatum per rationabile extentum*, and by the statutes 13 E. 1. *et* 27 E. I., tenants by Statutes Merchant and Staple shall hold *quousque sibi de debito prædicto ut satisfactum*, they may hold over in that case if the conusor or his heir interrupt them to recover the land; and this by the reason of the common law, for the statutes make

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no mention of it. And in these cases, the law makes no difference between interruption, or taking the profits by the conusor, or reversioner himself, or his heir, or by an assignee, or other who claims under him; and, therefore, if after judgment, or statute acknowledged, the conusor sells the land, and the extent is laid upon the purchaser, who interrupts the conusee, he shall hold over. And so it is if, after the land extended in the conusor's possession, he conveys away the land, and the grantee or feoffee enters upon the conusee, he shall hold over; for no man shall take advantage of his own wrong; and as an assignee shall have benefit of a casual profit received to bring a *scire facias* to determine the extent within the time, so if, by the unjust entry of the assignee of the extender, the conusee cannot receive the profits, it is just that he should hold over.

If after a judgment of statute acknowledged, under the statutes of West. 2. c. 5. 13 E. 1. and 27 E. 3. the conusor sells the land, and the extent is laid upon the purchaser, who interrupts the conusee, he shall hold over. And so it is, if after the land is extended in the conusor's possession, he conveys away the land, and the grantee or feoffee enters on the conusee, he shall hold over.

The reason is the same in the principal case: here a feoffment is made to the use of Humphrey Mackworth, of all for his life, and after particular limitation of part the fee of the whole is limited to him and to his heirs; and in the same feoffment there is a declaration, if those several sums be not paid, then the feoffees to stand seised to the use of them and their heirs, till they have levied the said several sums, and after to the former uses.

When there was a failure of payment of the monies, the feoffees might have entered: if they had entered, and Humphrey had re-entered, and so they had been interrupted by Humphrey, they might have held over upon the reason and authorities before mentioned. *Pari ratione*, when he continues the possession, and the receipt of the profits, the feoffees, when they enter, shall not be discounted those profits which Humphrey himself had received.

The same reason it is if Humphrey himself had assigned, or for a valuable consideration had conveyed over the land to another, after failure of payment; for I will not put the question, if there had been a disturbance before the contingent happened, (it not being in our case) the feoffee or assignee took the estate, subject to this use, and the profits received by him, shall not give advantage to him to bar Peter Venables, &c. from entering, or holding over, no more than if a feoffee enter upon tenant by *elegit*, or Statute Merchant, he shall take advantage to discount the profits by him received, as received upon the extent; for the heir, or assignee in such case comes in under, and takes the estate liable to the precedent charge.

That is our case here; for though I shall take Thomas Mackworth and his wife in this case to be as purchasers, yet

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they come under Humphrey, whose estate at the time of the settlement was clogged with this use; and he cannot have it freer than Humphrey could devise it to him. So that, be he heir or assignee, or come in upon or without a valuable consideration, or have he notice, or not notice, of the former settlement, it alters not the case. Thomas Mackworth's estate was subject to the use and estate of Peter Venables for raising the money; and the profits received, either by him or by Humphrey Mackworth, shall not turn to the disadvantage of Peter Venables, the feoffee, or those for whom he is trustee. And the very resolution in Corbet's case, the second resolution, if well considered, is stronger than our case. There it is resolved, that "when the heir of the devisor in that principal case, or he in the reversion, or remainder in the case of a lease, or limitation of use, enters upon him to whom the land is devised, demised, or limited till such a sum be paid, and expulses him; it is in the election of the party expulsed to bring his action, and recover the mesne profits, which shall be accounted parcel of the sum; *or* he may enter and retain the land till the entire sum levied." And the book gives it for a rule, "when he that is to re-have the land *fait le tort*, does the wrong; against him and all others who claim under him he that is expulsed, if he will, may re-enter and hold the land, and the other shall not take avail of his own wrong;" so are the very words of the book.

4 Co. 82.

There is indeed some difference between the cases; for that resolution mentions, first, an entry of him to whom such a particular estate is limited, and then an expulsion: but in our case Peter Venables never entered after the money payable; but Humphrey Mackworth and his assigns continued to receive the profits during all that space wherein the money might have been raised. But the reason is the same in both cases. The reason pinches not upon the expulsion; and the heir, who entered after the death of the devisor in that principal case, expulsed not the devisee: but it pinches upon the taking the profits *per tort*,—that he shall not take advantage of his own wrong, and discount those profits which he himself hath received. It was a wrong to take those profits which belonged to another; for the continuance of Humphrey Mackworth at the best was in nature of "tenant at sufferance, who hath no legal interest," as the book saith: but is a "*deforceor*," though an action of trespass cannot be brought against him. And so is his assignee but in the same condition, and claims under him who did the first wrong; and he also, taking those profits which should have been taken by another, shall not take advantage of that wrong.

4 Co. 24. Rous's case.

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The principal case of Corbet was,—Where a devise was till 800*l.* levied,—there was no expulsion of the devisee, but the heir entered, against whom no action of trespass would lie,—the devisee upon his entry shall hold over; for the heir shall not take advantage of his own wrong. But there is a great difference where he in the remainder or reversion, or his assigns, claims by the same conveyance with theirs who have an estate subject to a limitation *quousque*, and where an estate is derived to him by a subsequent conveyance.

Blackbarr and Lassel's case was this :—

Molineux covenanted to stand seised to the use of himself for life, and after to the use of his daughters unmarried, till each of them respectively shall have levied 500*l.*, remainder to his eldest son for life, &c., with remainders over. The eldest son enters. In that case it was resolved, that the eldest daughter shall not enter after her 500*l.* might have been levied: but the reason is, it would be to the prejudice of her other sisters who claim by the same conveyance, and not under the eldest son; and the holding over is only in cases where none are concerned in prejudice but they who did the wrong, or those who claim under them.

Mich. 42 Eliz. 3 Cr. 800.

Holding over is only in cases where none are concerned in prejudice, but they who did the wrong, or those who claim under them.

And so in our case, if Humphrey had in the same conveyance limited the lands to himself for life, with such a contingent limitation of payment of 100*l.* a year to his children; and in default thereof to the use of the feoffees, and their heirs *quousque*, and after to Thomas Mackworth; I make no doubt but the entry of the feoffees should not have prejudiced him; for he claimed not under the estate which was clogged with this use to the feoffees for raising the money. But here Thomas claims by a subsequent conveyance, and under the estate that was so clogged.

In Moor's Reports, 556, a case is,—Robert Rosse, 26 Eliz. levied a fine to the use of himself for life, remainder to his executors till they have levied 300*l.* for performance of his will:—he dies; the executors permit the Earl of Rutland, who was next in remainder, to enter, who takes more profits than would have satisfied it. It is resolved there by the opinion of Popham and Anderson, that the estate of the executors was determined by their negligence, because they might have levied the money, and voluntarily suffered another to enter.

This case may seem to be against me. But, first, it appears not whether or no the Earl of Rutland was living when it came in question, nor whether there was any limitation over after the remainder to the Earl of Rutland, or that the Earl was but tenant in tail; for if the Earl was then dead, and remainder limited over, or if he were tenant in tail, then the resolution

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A case doubted.

was good law; those in remainder who came not in under the Earl of Rutland, nor the issue who came in paramount, were not to be prejudiced by it. And it was probable the case might be so; for the estate was made 26 Eliz., and the question came not till after Sir Edward Coke was attorney-general. If the case were otherwise, I must suspect the report, because there is no year in certain set down for the resolution; and it is said an action of ejectment was brought in the Common Pleas for it; and yet the opinion delivered by Popham and Anderson at the motion of Cooke, attorney; and it is improbable that a matter of law in the Common Pleas should be extrajudicially determined by the two Chief Justices. And the resolution in Sir Andrew Corbet's case, in 41 and 42 Eliz. in the Court of Wards, where the same Chief Justices were assistants and reported by my Lord Coke himself, is against it; and there no mention made of such a resolution as that of Rosse's case, which had been proper enough if my Lord Coke had been privy to that resolution.

So that I hold for this point, that Peter Venables and the other feoffees for nonpayment of the 100*l.* after the birth of Mary have right to enter upon Humphrey Mackworth, and may hold over, and that the subsequent conveyance made by Humphrey Mackworth by lease and release to other uses, though upon a valuable consideration, shall not take away that power, or rather interest, which was vested in Peter Venables and the other feoffees: but that, notwithstanding the later conveyance to the use of Thomas and Ann Buckley, they might enter and hold over.

Effect of fine and nonclaim within five years, upon a right of entry.

But then, admitting the law to be as I have held, yet in 1653 a fine with proclamations was levied by Humphrey and others; and there was no entry made by Peter Venables, or the feoffees, till the 1st of December, 13 Car. 2. when the demise was made by Peter Venables to the plaintiff; which entry though it was within twenty years after the title of entry accrued to the feoffees, which was to be accounted from three months next after the birth of Mary the daughter, who was born Nov. 22, 1641, and so not to be taken away by the statute of 21 Jac. c. 16. of limitations, yet it was not within five years after the fine and proclamations.

And therefore the next question is, whether this fine with proclamations and nonclaim within five years do bar or take away the entry of Peter Venables. And taking the case thus singly, I conceive the feoffee Peter Venables is barred by a fine and nonclaim within five years.

The action here is brought for lands in Crowkill and Betton. This question reacheth not that part of the lands which lie in

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Crowkill; for the fine is levied only of the lands in Sutton, Betton Strange, and Abbots Betton; so that be the law as it will in this point, the plaintiff, notwithstanding the bar by the fine, if there be nothing else in the case, shall recover as to so much as lies in Crowkill.

But as to the lands in Betton, there arise two points considerable.—The one is,—whether the action of ejectment being brought of lands in Betton (without addition), and the fines being of lands in Betton Strange and Abbots Betton,—whether upon this record and verdict the Court shall adjudge that this fine was levied of the lands in Betton in the declaration mentioned? It hath been taken in a manner for granted by the plaintiff's counsel, and not determined by the other side, that the fine extends not to it. But I hold it doth.

The second is, admitting the fine extend to the lands in Betton in the declaration,—whether this fine and nonclaim shall in this case bar the entry of the lessor of the plaintiff?—and I think it doth.

For the first of them,—it is a question of fact, whether there be three towns, Betton, Abbots Betton, and Betton Strange?—or, secondly, only two towns, Abbots Betton and Betton Strange, and no Betton without addition?—or, thirdly, two hamlets or *lieux conus*, places known by the names of Abbots Betton and Betton Strange, and both within the town of Betton?

Where a declaration is of lands in B. and the jury find the ejectment of lands as in the declaration, all the parties are estopped to say there is no such place as B. If a writ of possession issue to the sheriff for lands in B., he is estopped to make a return that there is no such place; he must execute the writ at his peril.

Let the truth be as it will be in matter of fact, yet I conceive upon this record it shall be necessarily understood that the lands in Betton in the writ and declaration, and the lands in Abbots Betton and Betton Strange in the verdict, are the same. For, first, that there is such a town as Betton, whether the truth be so or no must be agreed upon this record; for the action and declaration being of lands in Betton, and the jury having found the ejectment *de tenementis infra scriptis*, as in the declaration, all the parties are estopped to say there is no such place as Betton; even the sheriff himself is estopped to say the contrary; so that if an *habere fac. possessionem* issue for lands in Betton, he is estopped to make a return that there is no such place, but must execute the writ at his peril.

2dly, that the lands in Abbots Betton and Betton Strange, mentioned in the record of the verdict, are by necessary intendment to be taken to be the same with the lands in Betton in the declaration; for that the verdict is *de tenementis infra scriptis*, that is, of Betton as well as Crowkill,—"that Humphrey Mackworth was seised of them in his demesne as of fee." Then they find the first indenture between Humphrey Mackworth and Peter Venables, &c. *in hæc verba;* and a grant thereof, *inter*

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alia, de tenementis predictis; in that there is an express limitation of the uses of Abbots Betton, and Betton Strange to the feoffees, not a word of Betton alone: but, indeed, there are general words of all his other lands in Shropshire, which might extend to Betton alone, if there were any such.

Thirdly, they find the bargain and sale, 10 Jul. 1652, to Sir Robert Eyton and other trustees, upon the marriage of Thomas Mackworth with Anne Buckley, to which Anne Buckley is a party *de tenementis infra scriptis in narratione infra scripti mentionatis;* that is, of the lands in Betton and Crowkill, *virtute cujus* they were possessed; and being so possessed, they find the indenture 20 Jul. made to the said Sir Robert Eyton and other trustees whereby, in consideration of that marriage, the lands of Abbots Betton, Betton Strange, Crowkill, and other lands in particular are settled, but no mention of Betton *per se.* These by common intendment are the same lands which were found in the bargain and sale for five years, and to work as a release by this indenture to those uses;—for else to what purpose is that bargain and sale in case the five years being long since expired? And why else is this large conveyance and the settlement of Anne Buckley's estate found, who is concerned in the Betton, but not in Crowkill? In that indenture there is a covenant for a fine to those uses.

Then the jury find a fine levied *de tenementis* (omitting *prædictis*) *in formâ sequente*, which is a fine of lands in Sutton, Betton Strange, and Abbots Betton. If it had been *de tenementis prædictis*, it could have no other construction but *de tenementis in narratione;* and then of necessity in their intendment Betton Strange and Abbots Betton had been the same with Betton in the declaration; for else it were not *de tenementis prædictis.* The omission, indeed, of "*prædictis*" in pleading may in many cases be fatal, but otherwise in verdicts being the saying of Lay Gents; and, therefore, in the verdict the want of the words "*prædictis*" alters not the case. For what had the jury to meddle with the tenements other than those in the declaration? they are *onerati et jurati ad veritatem de infra contentis dicendam*, and not of other lands; and Sutton is not in question;—then what did the fine concern the jury, if Betton, for which the action is brought, be not contained in the fine of Betton Strange and Betton Abbots? So that I conceive that what is mentioned in the verdict of Abbots Betton and Betton Strange, must be applied to Betton in the declaration.

The omission of the word "*prædictis*" in pleading may in many cases be fatal: but otherwise in verdicts.

We are not now upon pleading, but upon a verdict which in all times hath been allowed as favourable construction and strong intendment as this.

Hil. 12 and 13 Car. 2. in this Court between Hore and Dix,

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the declaration in an ejectment lease was of 10 acres of land in the parish of Spraydon. Upon a special verdict the jury found that the father of the lessor was seised of the lands in the declaration as heir; and find an indenture mentioning a settlement by him of divers lands in other parishes; and all his lands called North beck bere, or lying in North beck bere, in the parish of Spraydon: but did not find that those were the same lands which were in the declaration; but find the entry of the lessor, who was not heir to her father, after his death, into the lands specified in the declaration, (as it is here also found,) and adjudged, that the lands in the declaration shall be understood to be the same lands with North Bere in the deed. And the record of Sir George Brown's case, which is reported, 3 Co. 50., and Cleve and Vere's case, 1 Cr. 458, were there cited to the same purpose; and so in Peck and Chancel's case, 3 Cr. 828; (*d*)—for what had the Jury to meddle with those lands in their verdict, if they were not part of the lands in the declaration? It were easy to multiply cases on this ground.

I must agree, if there were in truth three several towns, Betton, Betton Strange, and Betton Abbots, the fine of land in Betton would not extend to Betton Strange, and Betton Abbots, as it is agreed in Stock and Fox's case. Nalton and Street being in the parish of Street, the fine of lands in Street would not carry Walton. *A fortiore*, a fine, as here, of lands in Betton Strange and Abbots Betton would not carry the lands in the town of Betton, if it were distinct from these. But on the other side, the law may well take Betton Strange and Abbots Betton to be both but hamlets, or places known, in one town called Betton; for a fine may be and frequently is levied of land as a hamlet, or *lieu conus;* and, therefore, shall be so intended here. For else the mentioning this fine, and all that which concerns Betton Abbots and Betton Strange, had been impertinent in this case, (Sutton, which is also in the fine, not being now in question;) and the contrary not appearing, *viz.* that they were several, it shall be intended they are one and the same. And the intendment is the stronger here, because it is not a total variance from the name: they agree in the name "Betton;" but the variance is in respect of the addition. It is frequent in these and other countries to distinguish a town by the name of Upper and Lower, North and South, and the like; and yet to be but one town. And the very indenture of settlement, 14 Car., limits Betton Wood and Betton Pool, without addition, to Mary for jointure; and yet expresseth

2 Cr. 121. 4 Jac. B. R.

2 Cr. 574. Monk and Butler's case, and Faveley and Easton's case. Cr. C. 276. A fine is frequently levied of land in a hamlet, or known places.

(*d*) These cases are stated at greater length in Carter 80, than in this text.

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them to lie in Abbots Betton, and Betton Strange, which is an evidence that they are both known by the name of Betton.

The next thing then to be considered is, admitting that this fine with proclamation, of lands in Betton Strange, and Abbots Betton, shall be intended to be a fine of the lands in Betton in the declaration,—what shall be the operation of this fine? and how far this fine and non-claim within five years shall bar the right of Peter Venables? Which question will be considerable upon the merits of the case upon a new action, be the law as it will upon the point admitted, if in truth Humphrey had no lands called Betton, or in Betton, but those in Betton Strange and Abbots Betton.

To clear this, I must distinguish between that part of Betton which was limited to Mary in jointure, and the rest; for which it is necessary to new state the case upon the deed.

14 Car. 1., a feoffment was made by indenture, of all the lands in Betton Strange and Betton Abbots, *inter alia*; of part thereof, *viz.* all Betton Strange, and part of Abbots Betton, to the use of Humphrey and Mary for her jointure, and the heirs of Humphrey; of other part of Abbots Betton to him for life, and after to his first and other sons by her, and the heirs males of their bodies; and after to the use of him and his heirs. And of the rest, which may include other part of Abbots Betton, also to him in fee. Then there is a covenant to pay 100*l.* within three months after the birth of every child. And it is declared, if the payment be not made accordingly, the feoffees shall stand seised of all the premises, except such part thereof as are limited for the jointure of Mary, and the premises limited to the use of the heirs males of the body of Humphrey to be begotten upon the body of the said Mary, for and during the said several and respective estates only; and from and after the several ends of those several estates, of those lands also, to the use of Peter Venables, &c. and their heirs, until they have fully levied out of the rents, issues, and yearly revenues thereof, every of the said sums of 100*l.*, with damages for non-payment thereof, after the rate of 8*l. per cent.*; and after the said sums levied as aforesaid, then to the uses and purposes in the said indenture before expressed, any thing therein contained to the contrary notwithstanding.

Afterwards Mary, a daughter, is born; and the 100*l.* not paid. Then, 1652, there being then no son of Mary the wife living, though in truth not found, by lease and release by Humphrey, and Mary his wife, the premises of Betton Strange and Abbots Betton are (*inter alia*) limited to the use of Humphrey and his heirs till the marriage of Thomas with Anne

Buckley; and after of Betton Strange, and a great part of the rest to the use of Anne Buckley for life, and after to Thomas Mackworth, for ninety-nine years, if he so long live; and of other part to the use of Humphrey for life; and after to the use of Thomas for life, with remainder over. And a new jointure is limited to Mary, the wife of Humphrey; and afterwards, the marriage having taken effect, in Michaelmas term, 1653, a fine with proclamation was levied by Humphrey and Mary, and Thomas and Anne, of the premises in Abbots Betton, and Betton Strange, and lands in Sutton to the use of that indenture.

Upon these conveyances it appears, that as to the lands limited by the first indenture to Mary for jointure, which were *all Betton Strange, and part of Abbots Betton,* by the express words of the deed, the feoffees are not seised of them towards the levying of the 100*l.*, till the jointure of Mary determined; after the end of that estate, then of these also: which words, I conceive, are to have this meaning, that upon failure of payment the reversion of that jointure is also intended to be presently vested in Peter Venables and the other feoffees, and not to wait till Mary be dead. But the possession during the estate in jointure is not liable to the payment thereof. As in the common case, if I limit lands to one for his life, and after his death to another; though I limit it after his death to another, yet he hath a present estate, but to take effect in possession after the other's death. If the law here were otherwise, that the lands in jointure were not liable to the 100*l.* during the estate in jointure, it would be as strong for my conclusions; for then the entry of the plaintiff was not good into these lands as long as that estate limited in jointure continues, which it yet doth, Mary being alive. But I think the use of the reversion of the jointure, for the levying of the 100*l.* upon non payment thereof, vests in Peter Venables; so that after failure of payment, in construction of law Humphrey Mackworth and his wife have an estate for their lives in jointnre, the reversion in Peter Venables.

Then when Humphrey and Mary his wife lease and release part to the use of Anne Buckley for life; and other parts to the use of Humphrey for life, with remainder over; this, as to jointure lands of Mary, vests a good estate determinable by their deaths, and no forfeiture by the lease and release; yet the fine by them and Thomas, and Anne Buckley, works a forfeiture: but there being no entry within five years, Peter Venables is barred of his entry for a forfeiture during the life of Mary, though perhaps he may have a new five years after their deaths. As in Lawn and Tooker's case, tenant for life levies 3 Co. 78.

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a fine with proclamations, and five years pass, he in reversion or in remainder shall be barred, but shall have five years *de novo* after the death of the tenant for life. But now for the rest of Abbots Betton not in jointure, all the uses of it ceased upon non-payment of the 100*l.*, as well of those lands limited to the first son by Mary, as the rest; for the exception of the premises limited to the use of the heirs males of the body of Humphrey to be begotten was void, there being no such limitation; or if that shall be intended of the use limited to the sons by Mary, yet there being in truth no sons at the time of the fine levied, the other uses to Humphrey were ceased.

So that now this is the case in effect, as to all the rest of Abbots Betton, not limited in jointure by the limitation of use in the feoffment, Humphrey Mackworth is seised to him, and his heirs, proviso if 100*l.* be not paid within three months after the birth of Mary, that then the feoffees shall stand seised thereof to the use of them and their heirs, till the 100*l.* and interest of it raised, and after to the former uses. The money is not paid, whereby the use ceaseth. The feoffees do not enter. Humphrey Mackworth makes a lease and release in fee; and then levies a fine to the releasees, with proclamation, and five years pass; whether this bars the entry of the feoffees?

I hold it doth.

If a feoffment be to the use of A. and his heirs *quousque* he fail of payment of so much money, and after to the use of B. and his heirs; and A. levy a fine, and then fail in the payment; B. is not barred, although he enter not within five years. But, if in such case A. fail in the payment, and then levy the fine, and five years pass without entry of B., query whether the nonclaim shall bar,

(*e*) If a feoffment be made to the use of A. and his heirs, *quousque* he fail of payment of so much money; and after to the use of B. and his heirs; if A. levy a fine, and after fail in payment of the monies, and B. enters not within five years, yet it hath been held he is not barred; for A. had a good estate when he levied the fine, and he might lawfully levy it; and though B. claimed not under the fine levied, yet the right accrued to B. after the fine levied. But if A. had failed of payment, and then had levied the fine, and five years had passed without entry of B. (which comes nearer to our case, the fine being levied after the non-payment of the 100*l.*; and after the right accrued to Peter Venables to enter) it is more difficult to determine whether the nonclaim within five years shall bar B., or no; for it may be said, if the use to A. be wholly determined before the fine levied, then his possession is only *quasi* as tenant at sufferance, and when he levies a fine, *partes ad finem nihil habuerunt*, and so the fine shall not bar.

(*e*) In Carter's report of Thomason *v.* Mackworth this part of the case is stated with great incorrectness.

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Springing uses.

[*Note.*—A freehold passeth by bargain and sale without entry or claim;—why not, by the same reason, another estate by way of use shall cease to one, and settle in another without entry and claim; though not to bring an action of trespass, yet to settle the freehold in him? And this is the usual conveyance, where a contingent executory use is limited—to limit it to one *quousque*, &c., and after to another, upon the contingent happening, the one use ceaseth, and the other ariseth in an instant.]

If it be not determined till the entry or claim of B. when he had an estate; and it was lawful for him by fine to convey it; and B. not having an estate till entry or claim, it was not turned to a right. And it is resolved in Podger's case, that no fine or warranty shall bar any estate in possession, reversion, or remainder, which is not divested, and put to a right; and the reason is there given, for he that hath an estate or interest in him cannot be put to his action, entry, or claim; for he hath that which the action, entry, or claim would vest, or give unto him. So in our principal case, it may be said, that when Humphrey Mackworth levied the fine, he had failed in payment of the money; and if the estate in fee were vested in Peter Venables without entry or claim, then Humphrey Mackworth had nothing in the land; and *partes finis nihil habuerunt.* If it were not vested in him, then Humphrey had still the estate, and Peter Venables his estate or interest not turned to a right, and so not barred by the fine.

9 Co. 106.

But if Peter Venables have a right only to a chattel upon nonpayment of the 100*l.*, the case may be said to differ; for that he leaves a reversion to Henry Mackworth, whereof a fine might be levied: and whether he hath a fee simple or a chattel upon failure of payment was touched only at the bar, but no opinion delivered in it; nor shall I now determine it. Much may be said that it is but a chattel; for though, in the Bishop of Bath's case, it is said to be resolved, that if A. lease land of the value of 20*l. per annum* to B., till 21*l.* be levied of the issues and profits, that this is but a lease at will without livery; yet it hath been received for law, that in case of use as well as devise, it being a sum in gross, which perhaps might never be paid, but to be paid out of the rents and profits, that it is a chattel. And then the limiting of it to him and his heirs will not alter the nature of a chattel; and it seems more reasonable so to construe it in this case, because there is a limitation over to the former uses.

C. C. 35.
C. C. 42.
8 Co. 96.
3 Cro. 315.
7 H. 8, 5.
4 Co. 82.

But be that as it will be, as to this point of a bar by fine and nonclaim, it will not alter our case; for if Peter Venables have an interest, be it to a chattel or to a fee, if it be turned

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to a right, the fine bars it; if not turned to a right, it doth not bar.

Sanders' case, as it it is put in Saffin's case, seems to be this: A lease for years being *in esse*, another lease was made to Sanders, to begin after that expired. The first lessee is ousted, and the lessor disseised; and the disseisor levies a fine, then the first term expires; and he that hath the future interest enters not within five years; yet the fine and nonclaim shall not bar him; for it is clear law the disseisor at first did not divest the future interest, but that he might have granted it over; and then it not being turned to a right before the fine levied, and so not divested when the fine was levied, it is said the fine should not bar it; otherwise, if he had a present right of entry, before the fine levied, though he had not actually entered.

See Henning and Brabazon. Arguments, 591. (f).

This case of Saunders is reported otherwise in 2 Cr. 61., where it is the opinion of three Judges, that though the fine be levied before the future interest commence, yet after it was commenced he is tied to five years; and some others have delivered the like opinion.

Where a lease for years is to commence after another lease, and the first expiring, the reversioner enters, and levies a fine, this fine with nonclaim shall bar; otherwise, if the first lessee had continued in possession, and the reversioner had levied a fine.

Upon the warrant of these cases, some have made a difference between a lease for years made to commence after another lease, and the first lease expiring, the reversioner enters, and levies a fine, that this fine with nonclaim shall bar; for it was turned to a right. But if the reversioner had not entered, but the first lessee had continued in possession, and the reversioner had levied a fine, it had not barred. So if a man being in possession make a lease to commence two years hence, and after the two years he continues possession, and levies a fine, they say this fine and nonclaim, it being but a continuance of the former possession, when he levied his fine, shall not bar; and by the same reason it may be urged that Humphrey Mackworth, being in possession when he levied the fine, and it being a continuance of his ancient possession, which was lawful, and so Peter Venables' interest not turned to a right, when fine was levied, this fine and nonclaim shall not bar.

Whether, where if one being in possession, make a lease to commence two years hence, and after the two years he continues possession, and levies a fine, this shall not bar. Query.

But what the law is in those other cases I shall not go about now to determine; for it may be said on the other side that the very fine itself, which is a feoffment of record, by the reversioner, turns the estate where there was a present ability to enter to a right; and that it is sufficient, if it be turned to

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(f) This reference is in the handwriting of the text of the manuscript. See pp. 2. and 11. of the present volume.

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a right by the fine, though not before; and, therefore, I shall not deliver my opinion in that case of a feoffment to the use of one and his heirs, *quousque* failure of payment, or the like, and after to the use of another; and after failure, he continuing in possession, levies a fine, whether this with nonclaim shall bar, or not. These and the like cases are very fit to be settled, there being much diversity of opinion in them.

Croker and Trevethin's case. Arg. 590. (*g*).

But that which guides my opinion, that this fine and nonclaim in our case is a bar, is this:—Here is a conveyance to the use of Humphrey Mackworth and his heirs, *quousque* failure, and after to Peter Venables. Humphrey fails in payment, whereby the continuance of his possession at best is but as tenant in sufferance. Then he makes a lease for five years to Sir Robert Eyton, &c., by virtue whereof they were possessed; for so is the verdict. If a lease for years by tenant at will makes a disseisin, *a fortiori* "will a lease," by a tenant at sufferance, with the entry of the lessee, turn the interest to a right. But it goes further, for there is a release also of the inheritance to them to those uses. So that here is a meddling and disposing of the interest and inheritance of the land; and, therefore, it puts the interest and estate of Peter Venables, who had a present ability and power to enter, to a right. And it being thus put to a right, the fine is levied; and so it hath its influence upon a nonclaim.

Mayor and Commonalty of London *v.* Alford, 1 Cr. 575. and 1 Cr. 201. Hulme and Haylock's case.

The very principal case of Saffin is upon this ground:—a lease was made for years, to begin after the determination of a former lease expired. He that had the future interest entered not: but the reversioner enters, and makes a feoffment, and after levies a fine. Resolved, that this fine and non-claim barred the future interest; for when the future interest commenced, although he did not enter, and so could bring no action of trespass; yet he had a present estate in the land, which might be divested; and by the feoffment it was turned into a right. Not that the livery did it; for the reversioner himself had right to the freehold upon which the livery was to work: but the intermeddling with the possession, and assigning an estate over, turned it to a right; for there could not be two several possessions at the same time by several titles. And the feoffment had settled the possession in the feoffee; and, therefore it could not be also in him that had the future interest.

5 Cr. 144.

(*g*) This case is stated in Hemming *v.* Brabazon, in page 11. of this Volume.

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So if a man make a lease to begin presently, the lessee before entry may grant it over, although the reversioner do continue in possession: but if the reversioner do make a present lease to another, who enters, now this first lease is turned to a right, and he cannot grant it over till he have by entry cleared it from the possession of the second lessee. So in our case here, the making of the lease and release by Humphrey Mackworth was an actual disposition of the possession of the land; and it could not be *simul et semel* in those to whom the lease and release was made, and to Peter Venables also; and, therefore, Peter Venables' interest was turned to a right, to be revested by entry; and the fine operated upon that lease and release, so that no claim being within five years, he is barred by the fine and non-claim.

Lease made to begin presently; the lessee may grant it over before entry, although the reversioner continue in possession. But if reversioner make a present lease to another who enters, the first lease is turned to a right, and cannot be granted over.

So that I have done with the merits of the case: the profit received by Humphrey Mackworth, or Thomas Mackworth, or his wife, or any others claiming under them, shall not be accounted to go in satisfaction or discharge of the monies to be raised by Peter Venables, but that he might hold over. But as to Betton, he is barred by the fine: but ought to have judgment for so much as lies in Crowkill.

Construction of verdicts.

As to the defects in the verdict, that in part has been already spoken to: but one thing hath been mainly insisted upon, as that which makes the verdict void, and that a *venire facias de novo* ought to issue: *viz.* that it is found that the premises in Betton Strange, Crowkill, and Abbots Betton, are of the yearly value of 120*l.* And it is thereupon urged that the verdict is naught; for that it is not found distinctly how much the value is of Crowkill, and how much of each of the Bettons, the 100*l.* being to be raised out of part presently, and not out of the rest till the particular estates determined. I think the strength of the objection is rather in this, that there are divers other lands in Sutton, Coleham, Brace Meale, Berrington, St. Julians, &c., which are not in this action, liable to the payment of the 100*l.*, and the 100*l.* with damages might have been raised out of them; and so *non constat* but that the 100*l.* is raised,—that the plaintiffs had any title.

To this objection it hath been answered, if it do not appear whether the 100*l.* be raised or not, then it shall be taken not to be raised, and there appears to have been a good estate to the plaintiff; and so much as is for the plaintiff's advantage is enough for him, as in Ughtred's case. And the defect of the verdict is of the defendant's part, on whose behalf the determination of the estate ought to be found: as if an estate *pur auter vie* be found, and not the death of *cestui que vie*, it shall

7 Co. 74.

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in a verdict be understood to continue; otherwise in pleading.

This answer doth not at all satisfy me. Where there is a particular conclusion upon a verdict, there not only where no title is found for the defendant, as in Goodal's case, but where no title is found for the plaintiff, as in Legat's case, 10 Co., 109, and Brockman's case, Mich. 4 Car. Scaec., the Court shall doubt of nothing but what the jurors doubt of: but where the conclusion is, *sed utrum super tot. materi. in formâ prædictâ per juratores prædictos in formâ prædictâ comperta*, the defendant be *culpabilis*, or not, *juratores ignorant*, and put it upon the Court, there the lessor of the plaintiff must shew a title for himself. And the case of a verdict is not to be likened to Ughtred's case, and cases of pleadings; for there it is sufficient to shew so much as makes his case; and the other as the case requires may reply, or rejoin upon it, if but part of the case be set. But if it appears upon a verdict that the lessor's title may or may not be determined notwithstanding the verdict, nothing can be added to it to inform the Court; and a *venire facias de novo* ought to issue. As for the case where it is not found, that the *cestui que vie* was living, that was upon another ground; for the Jury having found the lease, the law will intend they found him living; for otherwise the tenant could not lease.

Goodall's case. 5 Co. 97. G. 281, 300. Where the conclusion upon the verdict is particular, there the Court shall doubt of nothing but what the jurors doubt of, not only where no title is found for the defendant, but where no title is found for the plaintiff. Where the conclusion is *sed utrum super tota mat. in form. præd. per jurat. præd. in form. præd. compert.* the defendant be *culpabi.* or not, *juratores ignorant* and put it on the Court; there the lessor of the plaintiff must shew a title for himself. G. 307.

But the answer I give to these objections is this:—it is not necessary upon this verdict to find any values at all of the lands; it is found that the 200*l.* payable upon the births of Peter and Mary *nondum satisfact., nec solut. sunt. Ergo*, they are due and unpaid at the time of the action and verdict; and it shall be understood, being in a special verdict, that the whole 200*l.* is unpaid: but if any part be unpaid, the estate in the whole remains, whatsoever the value thereof is.

One thing more may be objected:—that it is found that the money is not satisfied nor paid, but not that the money is not raised: but I conceive this is too great a nicety to be insisted upon in a special verdict; for the verdict is all one as if he had said it is not satisfied to Peter Venables, or the co-trustees; for the matter of their verdict is not, whether the money be now satisfied to the daughter, or any else that concerns the jurors; for the payment to the daughter either before or after three months is nothing; it must be paid to the feoffees. Then the verdict must be understood when the jurors say it is not satisfied, as if they had expressly found that the money is not satisfied to the feoffees: if the money were raised by the feoffees, it is satisfied; and if not satisfied, it is not raised.

But to both these objections I further say, that upon the

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verdict itself sufficient appears, that the money was not raised, but that Humphrey and his assigns received the profits; for it appears, and so is found, that Humphrey was seised by virtue of the first indenture, made to Peter Venables and others. No entry at all is found to be made upon him; that he after bargained and sold for years; that he released the fee to new uses, and covenanted that he was then seised; that he and his son, and others, according to those uses levied the fine; that Humphrey died Jan. 1., and the next day after his death Thomas entered Jan. 2, 1654; and that when Peter Venables entered, Dec. 1, 13 Car. 2., and made the ejectment lease, Thomas Mackworth, the same day, ousted the lessee. So that here is a necessary and violent intendment (which is sufficient in a verdict) that from the first settlement Humphrey, and those who claimed under him, received the profits of the lands liable to the payment of the 100*l.*

A necessary and violent intendment is sufficient in a verdict.

An objection was made that Dorothy, the mother of Thomas, had part in jointure; and *non constat* what part, and so it might be these in question; and, therefore, the verdict not finding what they were, or the value of them, is void.

Resp. 1. It is not found expressly in the verdict that Dorothy had any jointure, but only an exception out of the estate of the feoffees for raising the 100*l.*, *viz.* except so many thereof as are now in jointure, *viz.* at the time of the deed, made to Dorothy his mother, and Mary his wife, for their respective estates; and after of those lands also to those uses, which concludes not.

Secondly, It appears that Thomas was after seised, and leased and released to uses. This being found by jury it shall not be intended, by disseisin, but either by death, or surrender of Dorothy, or other lawful way, if the contrary be not found. Also the entry of Thomas is found into the lands in question after the death of her father; this shall not be intended by disseisin.

But, thirdly, Admit Dorothy had a jointure, yet it appears by verdict that Thomas was seised in his demesne as of fee of the lands in the declaration; and, therefore, they could not be any part of Dorothy's jointure.

And, fourthly, It may be collected that Dorothy's jointure was only a rent of 150*l. per annum* issuing out of Sutton-house and lands, and Coleham, not now in question.

So, as I said before, I think judgment ought to be given for the plaintiff for so much of the lands in question in the declaration as lies in Crowkill: but not for that which lies in Betton.

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Hil. 15 and 16 Car. 2. Rot. 1391.

FOOTE *v.* BERKLEY. (*a*)

(A lease limited to begin after the end of a lease of thirty years made 32 Eliz., whereas the lease referred to was dated 42 Eliz. shall begin from the date of the lease granted.
Effect of misrecitals.
Construction of deeds.—Estoppels.)

BRIDGMAN, C. J.

Harg. MSS. No. 58, fol. 105. Eject. firm.

The case upon the record of the special verdict is this:—

The prior and convent of Bodwin, 18 Oct. 29 H. 8., *(inter alia)* lease the lands in question to John Munday and two others, for ninety-six years, post dat. at 60*l.* rent *per annum*. Queen Elizabeth being seised of the reversion, 22 Aprilis, 42 Eliz. demised the same to John Munday, from the end of that term of ninety-six years for thirty years, at the said rent of 60*l.* The reversion of the premises being come to the Earl of Holland and others, as trustees for the Queen mother for 99 years, she and her trustees by indenture, 14 Car. 1., reciting that Queen Elizabeth by her letters patent, bearing date 22 Apr. 32 Eliz. (whereas it was 42 Eliz.) had demised the premises to John Mundy, his executors and administrators, except as in the said letters patent is excepted, *habendum* to the said John Mundy, his executors and assigns, from the end of the term of 96 years, made of the premises to John Mundy, and the rest by the prior and convent, by indenture, 18 Oct. 29 H. 8., as by the said letters patent appeareth. And that the reversion expectant upon the said demise, came to the said Earl of Holland and others, trustees for the Queen mother, &c. *debito modo*, for the residue of a term of 99 years, to be accounted from Mich. 14 Jan. And that the Earl of Holland and others, the said trustees, being possessed thereof for divers years then

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(*a*) S. C. Carter 147, where the arguments of the other Judges are reported, two of whom agreed with Sir Orlando against the opinion of Tirrell, J. This decision in the Common Pleas was afterwards affirmed upon a writ of error in the King's Bench; 1 Siderf. 460; see also the same case in 1 Ley. 234; 1 Ventris 83, 88; 2 Keb. 322, 480, 514, 611, 654, and 673. See Rowe *v.* Huntington, Vaugh. 73.

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enduring, the Queen and her trustees in consideration of 60*l.* rent, reserved payable during the continuance of that lease, made to Mundy, over and above the rent reserved upon that lease, demise the premises to Francis Godolphin, (under whose title the plaintiffs claim), *habendum*, from the determination of the estate term, and interest in the premises granted by the said late Queen in the said recited letters patent made to the said John Mundy as aforesaid, for 21 years, rendering during the continuance of the term of the said John Mundy, in the said lease and premises granted by the said late Queen Elizabeth, 60*l.* *per annum* over and above the rent of 60*l.* thereupon reserved, and after during the said term of 21 years in reversion thereby granted 120*l.* *per annum*.

The question in general is, what interest passeth to Francis Godolphin, his estate for twenty-one years being limited to begin after the end of a lease of thirty years made 32 Eliz.; whereas there was none such, but one dated 42 Eliz. for thirty years.

To clear this case as to the point of fact:—Henry the Eighth beginning his reign in April 1509, the lease for ninety-six years, beginning 18 Oct. 29 H. 8., must be made in October 1537, which was twenty-eight years complete of his reign, *et quod excurrit* between April and October; and then the ninety-six years ended October 1633. Then the lease for thirty years, made 42 Eliz., to begin from the end of the lease for ninety-six years, *revera* began in October 1633; and ended in October 1663. And if the lease for twenty-one years to Godolphin had right recited that lease for thirty years, and so begun after the end of it, as was intended, it had begun in October 1663; and would be yet, for the most part of the years, in being.

But in regard it was made in reference to a lease made 32 Eliz., whereas there was none such, if it be to begin from the date of it, which was 12 Martii, 14 Car., 1638, then it began during Mundy's lease for thirty years, and ended 12 Martii, 1659, before the end of that lease to Mundy for thirty years, and then the plaintiff hath no title.

It is put for a rule, C. C. 46: "if a man by his indenture of lease either recite a lease which is not, or is void; or misrecite a lease in point material, which is *in esse*, *habend.* from the end of the former lease, this lease shall begin in course of time from the delivery thereof;" and he cites 3 E. 6. br., leases 62; Com. 148. Throgmorton and Tracy's case, and some other cases for it; which go no further than to prove, that if a lease

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be made *habendum* after the lease made thereof to J. S., and J. S. had no lease thereof, it shall begin presently: and so also in the Bishop of Bath's case, 6 Co. 36. That if A., reciting that B. hath a lease for years, demiseth the land to C. for years, to commence after the end of the former lease, and in truth there is no such former lease, the lease to C. shall begin presently; for in judgment of law a void limitation of the commencement of it and no limitation is all one.

A void limitation of time for the commencement of a lease is equivalent to no limitation of time at all.

Which cases do not directly reach to prove, that a lease to begin after a lease, misrecited in a point material, which is *in esse, if it be, in other points material, certainly recited*, shall begin presently, which yet is our case. And the cases may seem much to differ, between a lease for years limited *to begin after a lease made for twenty-one years to J. S., who had no lease at all*, and a lease for years limited *to begin after a lease made to J. S., 32 Eliz. for twenty-one years, but it was dated, not 32, but 42 Eliz.*, for there is in the latter case certainty enough, notwithstanding that falsity. There was a lease made to J. S. for twenty-one years, and but one lease to him for those years; and if the addition of the date of the lease, or the year of the queen, had been omitted, yet there had been certainty enough; and *utile per inutile non vitiatur*.

And this difference of the cases hath been strengthened by two authorities. The first, that of Dyer 116, which, as it is there reported, is, that a lease being made 30 Aug., the lessor reciting it as made 6 Aug., he demises the land to another, *habendum* for twenty-one years immediately after the end of the first lease; and in pleading he allegeth the first lease made, according to the truth, 30 Aug., and adjudged good upon an issue, *absque hoc quod demisit modo et formâ*.

But that case was this:—it was between Mount and Hodgekins, Mich. 1 & 2 P. et M.; Rot. 648. The record, which I have seen, was thus:—Trespass by Leonard Mount against Isabel Hodgkins for breaking his close at Lingford. The defendant pleads that E. 6. was seised, and by letters patent 4 Sept. 5 E. 6., for service grants it to Percival Smallpage, *habendum* from Mich. then next following for twenty-one years, who was possessed; and the plaintiff *clamando, &c.* (and so gives colour) enters. Upon which the defendant, as his servant, re-enters, &c. The plaintiff replies, that, long before, Sir John St. Leger was seised in fee, and 6 Feb. 31 H. 8., by indenture, reciting that whereas Richard and John Hodgkins had a lease made by the Lady Anne St. Leger, dated 30 Aug. 23 H. 8., of certain lands, *prout per indent.* In consideration of service, Sir John St. Leger demised to Lamborne and Katherine his wife, *habendum* in as large and ample manner

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as Richard and John Hodgkins then had, *habendum et tenendum* the lands aforesaid, unto the end and term of twenty-one years thence next and immediately following after the demise and indenture of the said Richard and John Hodgkins fully expired. That Lamborne and his wife entered, and were possessed; and being possessed, and Sir John St. Leger of the reversion, 20 Jan. 34 H. 8., by indenture between the King and Sir John granted to the King, &c., *pro ut;* and that H. 8. was seised of the reversion, which descended to E. 6., who being so seised, and Lamborne and Katherine his wife, possessed of the term, they, 4 E. 6., sell their interest to Leonard Mount; who being possessed, and E. 6. seised of the reversion, 4 Apr. 5 E. 6., he grants the reversion to the Lady Elizabeth, *habendum* for life; who being seised, the aforesaid 12 Aug. 6 E. 6., by indenture granted to Percival Smallpage, *habendum* from the aforesaid feast of St. Michael next following for twenty-one years; and that after and before their trespass, scil. anno. E. 6., the lease to Hodgkins ended, and the lease to Lamborne took commencement, by which the plaintiffs by virtue of the bargain from Lamborne and his wife, scil. 21 Apr., entered and were possessed, until the defendant, the last of Sept., entered upon him, and did the trespass *prout, &c.*

The defendant takes issue upon the lease alleged to be made to Lamborne, *non demisit modo et formâ;* and a special verdict was found, wherein it is said that Sir John St. Leger in the lease to Lamborne recites the lease made by the Lady Anne St. Leger, to Richard and John Hodgkins, to be made 6 Aug. (whereas the truth is, and so it is pleaded, it was made 30 Aug.) and the demise to Lamborne after that mistaken recital, is with an *habendum* for thirty-one years *prox. sequent.* after the demise and indenture of the said Richard and John Hodgkins fully expired; and the Jury concluded specially, *si dimissio per eandem indenturam fuit dimissa modo et formâ, pro ut prædict. Leonardus* the plaintiff *affirmavit, tunc assident. damna.* And judgment was *quia videtur eisdem justiciariis quod prædicta dimissio per prædict. Johannem St. Leger præf. Joh. Lamborne et Katherine sigillat. et deliberat. modo et formâ prædict. bona et valida in lege existit, ideo concess. quod prædict.,* the plaintiff, *recup., &c.* damages, &c.

The record receives several answers to make it differing from our case.

The first appears in my Lord Anderson's report of that case, fol. 3., and in Bendlow at large, that the *habendum* was for thirty years next after the demise and indenture to *Hodgkin,* and not after the *said* demise and indenture: but the word

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prædict. is omitted, and so the *habendum* must refer to the true lease, and not to the false recital.

Secondly, Admitting the lease to be limited for thirty years, to begin after a lease to Hodgkins, where there was none such, yet it is clear it is not so void but that it must begin in computation from the date, and then Hodgkins' lease expired in 1 & 2 P. and M., when the action was brought. There was above half the term remaining good, when this action was brought; so that it is clear the plaintiff hath a just title to the possession, and so might maintain the action of trespass.

This answer is given to it in Roll's Coll.

Thirdly, The plaintiff having a just cause of action, and entitled to the action of trespass, and it so appearing upon the special verdict found, the *modo et formâ* in this action is not material, nor in any like action where it appeareth the plaintiff hath cause of action: as appeareth by Hobart 72, 73. Cope and Skinner, Hob. 18. Moore and Musgrave cited at the bar.

The other case was, the case of Withes and Casson. It was, Hil. 12 Jac. Rot. 1964, a replevin (not trespass as my Lord Hobart reports it) for taking his cattle in Seaton at a place called Borough Close; and avowry was made by the defendant for himself and his wife, and conusance for Eliz. Casson, for that Philip Fairfax was seised in fee, and 2 Oct. 5 Jac. did demise it to Ralph Lawson, *habendum* from the feast of the Annunciation, *tunc prox. sequent.* for twenty-one years, *reddend.* 10*l.* *per ann.*; and that Philip Fairfax, reciting the lease *ut supra*, in consideration of 70*l.* *concessit et bargainizavit præfat.* (the avowment *et Eliz. Casson*) *reversionem prædictarum* 40 *acr. per nomen prædicti clausi vocat. Borough Close, una cum prædictâ reservatione* 10*l.* *super inde reservat. habendum et tenend. prædict. reversion. præd. clausi cum appurt. et prædict. redditum* 10*l.* *superinde reservat. præfat.* (*l'avowants*) *et assignatis suis pro et durant. vitis suis naturalibus, et eorum diutius vivent., si residuum prædicti termini* 21 *ann. mentionat. in prædict. recitat. indenturâ tam diu continuaret.* And for 25*l.* rent behind at the feast of St. Michael, 10 Jac., he did avow and make conusance as before. The plaintiff pleaded in bar, that Philip Fairfax did not grant the said reversion *modo et formâ pro ut, &c.* The Jury find all the matter just as it was said by the plaintiff, saving that they found that the lease to Lawson was made, *habendum à festo Purificationis*, and not *à festo Circumcis.*; and that Fairfax in his bargain and sale of the reversion did recite the lease made unto Lawson, *habendum à festo Annuntiat.*, which was not so, and then granted the reversion and rent *pro ut*; and concluded, *sed utrum* Philip Fairfax did grant the reversion *pro ut, &c. ignorant, &c.* And as it

1 Roll. 52. Hob. 128. "And so is the MS. Hob." Note in Mr. Hargrave's handwriting.

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is said in the report, the Court, *und voce*, gave judgment for the avowant; and held it to be a good grant of the reversion and rent.

To this case I give these answers: that though the former lease was misrecited, yet the grant to Casson was not of the reversion, expectant upon that misrecited lease, but it was *concessit reversionem prædicti clausi;* he had a reversion to grant, and a reversion with the rent thereunto incident passed. Then the *habendum prædictæ reversionis* for three lives, *si residuum prædicti termini* 21 *annorum in prædictâ recitat. indentura tamdiu continuerit,* (though there be no such lease as is misrecited) is good for the lives, upon the same ground as where a lease is made to A. to begin or *habendum* from and after a former lease to B., who had no lease at all; the lease to A. is not void, but begins presently, as appears by all the authorities above cited.

And it is all one as if I make a lease to A., and after grant the reversion of the lands to J. S., *habend.* for three lives, if a lease made thereof to B. (whereas there was none such) so long continue. This, I take it, is a good grant of the reversion; for where a term, or estate certain, is granted by deed, the reason is the same when it is limited to one upon a term, where there is none such, as it is where it is to begin after a term, where there is none such.

In a replevin it is sufficient if it appear upon the record that the avowant hath just cause to distrain, though not *modo et forma* as he hath set forth; for the Court must judge by the whole record. Hob. 72.

And though the estate for years is not *modo et formâ*, as the avowant hath set it forth; yet in a replevin it is sufficient, if it appear upon the record that the avowant had just cause to distrain, though not *modo et forma*, as he hath set forth; for the Court must adjudge upon the whole record. And, therefore, in Pope and Skinner's case, in replevin, the defendant avows as commoner the taking of the beasts damage feasant. The plaintiff in bar says, that Williams was seized of a house and land, &c., to which he had common, and demised the same unto him, 30 *Martii*, 11 *Jac.*, *habend.* from the Feast of the Annunciation next before, for a year. Upon issue taken on demand *modo et formâ*, the Jury find a lease made by Williams on another day, and to begin at another time; yet the substance being, whether the plaintiff had such a lease from Williams, as by force thereof he might have common at the time the plaintiff had judgment. But it is there agreed that in an *eject. firm.* it had been against him; for there he demands and recovers his term, and must make his title clearly; and many other cases may be put upon that ground.

But in this case of Withes and Casson, be the law what it will be, it comes not to our case; which is, where a lease limited to begin after a lease misrecited shall commence; wherein there

is no question but that it is good: but the question is only, when it shall commence, whether from the date, or from the expiration of the lease misrecited? If that case have the same rule, then when that replevin was brought, the three lives granted in reversion were *in esse*, and the true twenty-one years in possession was also in being, and so no question could come upon the point of misrecital. But the truth is, (which is my further answer to that case of Withe and Casson) that that case doth not fully come to our case; for there that commencement of the lease is not limited to begin *after* a misrecited lease, which is our principal case; but the time *how long it shall continue*, is referred to a lease misrecited, and where there is none such.

The current of authorities which have been before cited (to which others may be added) do clearly prove, that a lease for years, made *habend.* for a certain number of years *after* the end of the lease for twenty-one years, made thereof to J. S.; and there was no lease made to J. S.—that this lease begins presently, and is not void, nor to begin after the time; whereas that supposed lease to J. S. should by the recital thereof have ended. And as the law is so in case of a recital of a lease, where there was none; so I take my Lord Coke's opinion, touching the misrecital of a lease *in esse*, to be good law also, as my Lord Coke puts it, if the recital be in a point material. And if in the case of Withe and Casson it had not been in a replevin, but that there had been a lease made for twenty-one years, from the Annunciation, and the lessor reciting it to have been made for twenty-one years from the Purification; and granted the second lease *habendum*, as here, from the end of the said recited lease, I hold it somewhat strongly that the second lease had begun presently; for the misrecital was in a point material; for by it the commencement and end of the second lease would be altered from the intention of the parties appearing in the deed, if it should be construed to commence after the end of the true lease, and not before.

For Millar and Mainwaring's case—it is of great authority: but upon serious consideration of it, I think it comes not home to this point of a lease, misreciting a lease *in esse*. If there be any thing tending on this point, it is upon Morley's lease, for which I shall put the case at large.—John Earl of Oxford, being seised only in right of his wife, 27 H. 8. leaseth to Ann Seaton for thirty years; the wife dieth, and after he dies. John the second, his son, reciting (but misreciting) that lease to Seaton, which was then ended, demiseth to Rochester, *habendum* for thirty years from the end of the lease to Seaton, made 28 H. 8. It was adjudged that the lease to Rochester did begin presently. Afterwards, in 35 H. 8. the Earl re- 1 Cr. 399.

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citing Seaton's lease, leaseth to Hamlet Fryer the reversion, *habend.* the premises from the time it shall revert and come to his possession by surrender, forfeiture, or otherwise, for sixty years; this was void; for the grantor had no reversion, Seaton's lease being expired, and Rochester not having entered. Then Edward Earl of Oxford, reciting that his father such a day and year had leased to Rochester for thirty years, from the end of the lease made to Seaton, 27 H. 8. for thirty-four years; which was false; for in Rochester's lease it was misrecited to have been made 28 H. 8., and reciting the lease to Hamlet Fryer for sixty years, to begin after the expiration, surrender, or forfeiture, (omitting "*or otherwise,*") of the lease to Seaton he demises to Morley, *habend.* from the end of the said leases for fifty years.

In the fifth resolution of that case it was agreed by them all that Morley's lease began from the date, for that it misrecites the former leases; and so hath the same rule as the former, where it recites leases, and there be none such, which is a full authority, that if a lease be which misrecites the former lease, and in the *habendum* the estate is limited to begin after the end of that former lease, the second lease is to begin presently. And agreeable with this authority of Miller and Mainwaring, and my Lord Coke's, is the opinion of the Justices in Mount and Hodgkins' case; for, although there are other matters to warrant that judgment, yet the opinion of the Judges was, that the lease, misreciting the former, was good, and took effect by the demise, and that the recital was void; and the mentioning of the lease after the *habendum* was void also. So if a deed be dated the 30th of February, and a lease be limited to begin from the date, it shall not be void, but begin from the delivery, for the limitation was impossible.

The very words both in Bendlow and Anderson's Report.

C. C. 46., and seems to be warranted by 2 Co. 5. Goddard's case.

If a deed be dated the 30th Feb. and a lease be limited to begin from the date, it shall not be void, but begin from the delivery; for the limitation was impossible.

This case I agree to be good law, but it comes not to our case; for Hamlet Fryer's lease being never good, as being of a reversion where there was none, it is within the rule of those cases of recital of leases not *in esse*, not of leases *in esse* misrecited.

So that I now come shortly to our case; and I hold the difference in cases of a lease misrecited, and second lease limited to begin after it, to stand thus, as my Lord Coke puts it, "If the misrecital be in a point material, the second lease begins presently; but if the reference be never so strong, yet if the

Wherea lease is misrecited, and a second lease is limited to begin after it, if the misrecital be in a point material, the second lease begins presently: but if the reference be never so strong, yet if the variations be in a point immaterial, it shall begin after the end of the first lease.

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variations be in a point immaterial, it shall begin after the end of the first lease."

In our principal case, if the case were that the Earl of Holland and other the Queen's trustees had recited, that the Queen 32 Eliz. (instead of 42) had demised the premises to Munday, *habend.* for thirty years from the end of the term of ninety-six years made by the prior and convent, and had demised to Godolphin, *habend.* for twenty-one years from the end of the estate granted by the said Queen, by the said letters patent made to Mundy, I conceive, with submission to my brethren of another opinion, that this last lease had not commenced till the end of Mundy's lease, though made 42 Eliz.; for I conceive the misrecital to be in a point immaterial. Not but that it is clear the misrecital in the date of a deed may be essential; for if by it the estate and interest of the second lease be changed from what it should be by the intent of the deed appearing in itself, then it is material; as if the lease were made 42 Eliz. for twenty-one years from thenceforth, and it be misrecited to be made 32 Eliz., and a second lease be made, *habend.* from the end of the estate by the said indenture; now this second lease shall begin presently, for the time of the commencement and end of it is material; and it is changed, *in rei veritate*, from what it is in the deed.

The misrecital of the date of a deed may be essential—as if by it the estate be changed from what it should be by the intent of the deed appearing in itself.

But if a lease be made 42 Eliz. to J. S. for his life, and the lessor reciting that lease to be made 32 Eliz. demise the premises, *habend.* for twenty-one years from and after the end of the estate by the said grant, 32 Eliz. made to the said J. S., I do conceive, though there was no such indenture, 32 Eliz., yet the second lease shall begin from and after the death of J.S.,and not during his life, for the time of the commencement or end of the lease is not changed by the misrecital; there is certainty enough in the thing, and no prejudice by it to any person.

And so in the principal case, there being a lease made by the prior and convent for ninety-six years, and another by the Queen, 42 Eliz. to Mundy for thirty years, after the end of the ninety-six years; and the trustees reciting that lease to be made 32 Eliz., for thirty years, demise the premises to Godolphin for twenty-one years, to commence after the end of the said lease to Mundy,—I say, if that were the case, the misrecital would not be material; for the time of the commencement and end of Godolphin's lease is certain; and there is sufficient certainty to give satisfaction what lease was intended.

(*b*) And what is material, and what not, in the case of a mis-

What is material, and what not, in case of a misrecital, is to be measured as it is in reference to the instrument in which the misrecital is.

(*b*) This part of the case seems to be materially misstated in Carter, p. 157.

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recital, is to be measured as it is in reference to the instrument in which the misrecital is. The alteration or change of the date of a deed may be and is material to the deed itself: but yet the misrecital of it may not be material (as in the cases I have put) within the deed or instrument which refers to it, nor as to the estate created by it.

The change of the date of a deed is material to the deed itself: but yet the misrecital of it may not be material within the instrument referring to it, nor as to the estate created by it.

To this purpose there is a notable case between Moody and Lewin, Michaelmas, 29 & 30 Eliz. Rot. 2529, in this Court. The case is now in print in 3 Croke: but I have a report of it under the proper hand of one that was then a serjeant, much more full and large; where the case was this,—Replevin by Dr. Lewin against Moody. He avowed to J. S. for 20*l.* rent-charge granted to him by Fowke; the plaintiff traversed the grant to Fowke. The jury found that 14 Eliz. a fine was levied between Loveland and Rutland, plaintiffs, and Fowke and of others, defendants, of the manor of Godshall, by which they granted the manors to the plaintiffs; and the plaintiffs granted a rent-charge of 40*l.* to Fowke; and after Fowke, by indenture between him and J. S., reciting that where a fine was levied 14 Eliz. of the same manor, between Fowke and seven others plaintiffs, and Loveland and Rutland defendants, (whereas Fowke and the seven others were deforceants, and the others plaintiffs), by which fine the two deforceants grant and render a rent of 20*l.* to the said Fowke in fee, now the said Fowke grants *eundem redditum* to the said J. S. in fee; and the jury further find that there was no fine levied between Fowke and the seven others plaintiffs, and Loveland and Rutland deforceants; and also that in the fine there was no other land contained but the manor. And after solemn argument, and at first differing opinions of the judges, it was at last adjudged for the avowant; for there is sufficient certainty of the thing granted, and of the intention of the parties to grant it; and nothing is mistaken but the deforceant and plaintiffs in the fine, which is not material. And yet the recital was false, and he granted *eundem redditum*, which in words is nothing but what was so recited: but the concord was the substance, and that was right; and the quantity of the rent was express, which, as Anderson said in that case, was sufficient. So if the defendant plead a record in bar, and the plaintiff replies *non tiel* record, and a record is certified varying in the day only, it is good, notwithstanding such a petit variance.

3 Cr. 127.

Vide 23 Eliz. 376. Cotton's case.

38 Eliz. 317. If defendant plead a record in bar, and the plaintiff replies *non tiel record*; and a record is certified, varying in the day only; it is good, notwithstanding such a petit variance.

2 Cro. 53.

Bellingham and Alsop's case, 37 Eliz. Thomas Fitzherbert

bargains and sells to Weeks and Hunt; who, reciting that Thomas Fitzherbert by indenture inrolled 37 Eliz. had sold to them all such lands, they, in consideration of money, bargain and sell to the said Fitzherbert and his heirs all the estates which they had by the said indenture inrolled of and in the said lands, to have and to hold to him and his heirs. The indenture was not then, but within the six months inrolled. Adjudged that the land did not pass by reason of the misrecital of the deed to be inrolled by three justices, but two justices of the contrary opinion in that point.

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But be the law as it will be, there is a great difference between that case, where the grant is by the deed of such an estate which I had by another deed, and I claim by it, and when I make it only an inducement to another thing; when I make it but a passage to another estate, the misrecital not being in that which is granted by that deed. Many more cases of variances in recitals, or in references to indentures, records, or the like may be put. Let the reference be never so strict in the words; yet if the variance be immaterial, or if there be certainty sufficient in it to satisfy the Court that it is the same thing which was intended, the variance shall not hurt. But otherwise it is where it doth not appear that the instrument referring, and that to which it refers, are the same.

Let the reference be never so strict in the words, yet if the variance be immaterial, or if there be certainty sufficient in it to satisfy the Court that it is the same thing which was intended, the variance shall not hurt. But otherwise it is where it does not appear that the instrument referring, and that to which it refers, are not the same.

As if a recognizance bear date in April, and a defeasance be made reciting a recognizance made in May, it cannot be construed that these are both one by any certainty in the recognizance or indenture.

If a recognizance bear date in April, and a defeasance be made reciting a recognizance made in May, it cannot be construed that those are both one by any certainty in the recognizance or indenture.

So Marriot and Smith's case.—A charter of feoffment was made, Sept. 10; the grantee reciting it to be made Sept. 11, gave authority to A. to receive livery and seisin for him. Though the name of the feoffor, feoffee, and certainty of the land, be the same, but the date only false, yet he cannot take livery; for that his power was to take it *secundum formam Chartæ*, Sept. 10. 3 Cr. 603.

Many cases are put in the Earl of Leicester's case, (but that is in cases of authorities) where a time or place are expressed to set forth a certainty; and a reference is to them and mistaken, all is void: and so is the principal case there. Com. 392, 3. Powers.

But I have argued all this by concession, as if in our case the recital had been that the lease to Mundy was recited to be made, 32 Eliz. (whereas it was 42 Eliz.) for thirty years, and Godolphin's lease had been limited after that expired. But

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the case in truth is otherwise; for the recital is "that Queen Elizabeth, 32 Eliz., had demised the premises to Mundy, *habendum* to him, his executors and assigns, from the end of the term of ninety-six years made by the prior and convent:" but it doth not express what term Mundy was to have by that lease. So that there is a false recital of the date of Mundy's lease, and no time expressed when it shall begin, or when it shall end. The term for which it was granted and when it was to end was the material thing which should have salved the falsity of the date by its certainty, and now it is *penitus vagum et incertum*.

There had been no question if the recital of Mundy's lease had been no more but that, "whereas the Queen had demised to Mundy by her letters patent, 32 Eliz., and then the Earl of Holland had demised the premises to Godolphin, *habendum* from the end of the estate granted by the said letters patent for twenty-one years;" this had not been good to make it to commence after Mundy's true lease; for the recital was false, and a reference to an estate where there was none such.

Hob. 55. H. 38. El. B. R. Halswell *v.* Aylesworth.

It is the same in effect here, there being nothing certain recited but the person to take and the lands demised, which alone make no sufficient certainty that it must be construed to be the same with the true lease. And then the *habendum*, being from the end of the term granted by the said late Queen in the said recited letters patent made to the said John Mundy as aforesaid,—there being no such letters patent, no term granted by such letters patent,—it must be construed as if there were no lease then in *esse*.

Suppose the lease to Godolphin had recited the former lease to have been made, not to John Mundy, but to J. H., and then it is demised to Godolphin, *habendum* from the end of the said lease made to J. H. for twenty-one years, though there were a true recital of the date of Mundy's lease and of the lands, yet this would not make it to take effect after the end of Mundy's lease, but presently.

And this appears by Wrottesly and Adam's case; where it is admitted, that if a lease be made to begin after the end of the lease made to Wilcocks, if there be no such demise made to Wilcocks, though there be a lease *in esse* for the same term of the same lands, yet the lease shall begin presently in computation of time; and therefore in that case it was holpen, because Wilcocks took to wife the woman to whom the demise was made, and so by act in law the same was demised to Wilcocks.

The same reason is in this case:—the true certainty of the person of the lessor, and of the lessee, and of the term in the recited lease, are necessary.

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The lease to Mundy in the recital of Godolphin's lease at best appears to be but a lease at will, if that; for if Queen Elizabeth had granted to Mundy so as is recited, he had been at most but tenant at will, and that estate had determined by granting the reversion out of the crown.

6 C. 36. Co. de Bath.

An objection hath been made that there needed not a mention of Mundy's lease at all. If the King had made a lease, *habendum* after the end of the former lease, if any be, if not, from such a feast, for twenty-one years, this is good in the case of the King, without mentioning the lease—*a fortiore* here;—and here is some certainty in the *habendum*, *et utile per inutile non vitiatur*, especially if the words be transposed, "*habendum* to Godolphin from the end of the estate granted to Mundy by the said late Queen, by the said letters patent, &c.;" whereas the certainty is first set, "*habendum* to Godolphin from the end of the estate granted by the said late Queen in the said letters patent to the said Mundy;" and if the certainty were first set, *utile per inutile non vitiatur*.

To this I answer,(*c*)—

Hob. 171.

First, *verba transposita non operantur mutatione sensus*. In that very case, as it is put, I conceive the falsity, let it be put first or put last, it hath one and the same operation. The rule is well given in Stukely and Butler's case, "when one entire clause in a grant or lease is carried on with a connection so as it makes but one entire sentence till the whole be finished, one part may not only abridge and correct, but utterly frustrate and make void, the whole grant;" and upon that ground Doughty's case, 3 Co. 9. is denied to be law, as contrary to the resolution in Dodington's case, 2 Co. 32. And it is well said by my Ld. Hobart, "in one sentence it is vain to imagine one part before another;" for though words can neither be spoken, nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence.

The rule of *utile per inutile non vitiatur* holds in divided clauses: but in one and the same clause the rule is *inutile est, nisi totâ sententiâ perspectâ, de aliquâ parte dubitare*. (*c*)

Feoffment of lands in London, *habendum* to the feoffee and his heirs after the death of the feoffor—it is a void *habendum* in the whole. But if it had been *habendum* to him and his heirs, *this estate to begin after the death of the feoffor*, the latter clause only had been void.

The difference appears by the cases there put.—One made a feoffment of lands in London, *habendum* to the feoffee and his heirs, after the death of the feoffor—it is a void *habendum* in

(*c*) With respect to these passages of the judgment Carter states that he "remembered not the rule" qualified in them. The important part of the judgment comprised in pp. 539 to 543 is reported by Carter in ten lines only.

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the whole. But if it had been *habendum* to him and his heirs, this estate to begin after the death of the feoffor. This had been a good grant, being upon divided clauses. So if lessee for years grant his term, *habendum* after his death, it is good, and the *habend.* void. But if lessee for years grant his term after his death, the grant is void. But yet the falsity in the *habendum* is not to all purposes to be construed as it is in the body of a grant; for if I grant land to A., *habendum* for twenty-one years after the lease to B. expired, whereas B. had none such, the whole *habend.* is not void, though it is one sentence; and the words after the lease to B. are to be rejected: but it shall be good for the rest. And so I think it would be if I grant lands to A. for twenty-one years, after the lease to B. expired, (without an *habendum*) in one entire sentence. But if it were of a freehold to one and his heirs, (or *habendum* to him and his heirs) after the death of the feoffor, the entire clause is void, and not only those words,—*after the death of the feoffor.*

Grant of land to A., *habendum* for 21 years, after the lease to B. expired, whereas B. had none such, the words *after the lease to B.* only are to be rejected, and the whole *habendum* is not void, though it is one sentence.

The reason of which difference, I conceive, is because in one case the rule of law will not bear such an estate as is intended; in the other case, the estate which he intended would stand with the rules of law, and therefore shall be pursued *cy pres*, so near as may be, not to make it wholly void, but only in that in which there is a false reference, and as if no mention had been made of that in reference whereunto there is a falsity.

The reason of the difference is, because in one case the rule of law will not bear such an estate as is intended —in the other case the estate intended would stand with the rules of law, and therefore shall be pursued *cy pres*,—so near as may be,—not to be wholly void, but only in that in which there is a false reference.

And so in other cases of reference:—

That if a man misrecite a lease *in esse*, in a point material, and grant the lands to another, *habendum* from the end of a former lease, this shall have commencement (not from the time of the former) but as if no such lease had been—from the time of the making of the latter lease; for the reason in truth is the same as where you recite a lease which was not, or is void; for where a lease is misrecited, there is no such lease as that to which the reference is made.

If a lease *in esse* be in a point material misrecited, in a new lease of the lands (granted to another lessee, *habendum from the end of the former misrecited lease*) this shall begin from the making of the new lease, as if no such former lease had been; for where a lease is misrecited, there is no such lease as that to which the reference is made. 1 Cr. 399. Miller and Mainwaring.

The date of the lease, as whether it was made the 32 or 42 Eliz. is so material, that if it be rased, the interest and lease itself is void, as some of the justices held: but the deed was void all of them held. And if the razure be not material (being made to a stranger) it would not avoid the deed.

Pigot's case. 11 C. 27.

It may be objected that it was not material to have recited the date of the lease by Queen Elizabeth to Mundy: and I agree there was no necessity to have made any recital of the date of the lease, or of the persons to whom it was made, or of

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A term in reversion may be granted for years, to commence from the expiration of former leases in being —both in the case of the King and of common persons. If a former lease be misrecited, so as the name of the lessee be mistaken, or the like, the lease which is limited to begin after the lease so misrecited shall begin presently.

the time when it began or ended, or any recital at all; for this last lease by the trustees of the Queen's mother is the lease of common persons, and if they had recited that they possessed of a term in reversion (expectant upon a lease made to John Mundy, or without any mention of Mundy's lease) and granted for years, to commence from the expiration of former leases in being, it had been good. It is so in leases by the King, *a fortiore* in cases of common persons. But yet no man will deny but if it be misrecited, so as the name of the lessee be mistaken, or the like, the lease, which is limited to commence after the lease so misrecited will begin presently.

In Palmer's case it is agreed—if the sheriff (upon a *fieri facias*,) reciting that the defendant had a term for years, sell it, it is adjudged good: but if he recite that he had a term to commence 2 & 3 P. and M., and sell the same term, this is void if it commences 3 & 4 P. and M.

4 Co. 74. Palmer's case.

Here the date of the lease to Mundy is material, as in many other respects, so in respect of the reference to it for the commencement of Godolphin's lease, and for the payment of 60*l.* before, and 120*l.* *per annum* after it commenced.

In my opinion the resolution by all the Justices upon Morley's lease in Miller and Mainwaring's case is full to our purpose. The case, so far as it concerns Morley's lease, I must again put at large.—John, Earl of Oxford, being seised only in right of his wife, 27 H. 8., leaseth to Anne Seaton for thirty-four years; his wife died, and after he died. John the second, his son, reciting (but misreciting) that lease to Seaton, which was then ended, demiseth to Rochester, *habendum* for thirty years from the end of the lease to Seaton made 28 H. 8. It was adjudged the lease to Rochester began presently.

So that if there be no more in our case but that the former lease is misrecited in the date to have been made 32 Eliz., and the lease to Godolphin is to begin after the expiration of that term, I think, upon the reason and authorities before mentioned, that Godolphin's lease must begin from the making; there being no such time for the commencement of it as is limited in the *habendum*.

Against this it hath been objected, that there is certainty enough; for it is found that there was no other lease made to Mundy but one, and that for thirty years; and that the lease was made to begin after the ninety-six years ended; all which is true,—and, therefore, the falsity in the date of the recited lease shall not vitiate it, upon the rule *utile per inutile non vitiatur*.

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To this I answer, first, that the same objection might be made to Miller and Mainwaring's case, and all the cases above cited, that have been resolved so solemnly, which have as many particular certainties as here.

But, secondly, where the clause or sentence is one and entire, you shall not pick and choose, but it must be entirely true or false. It is here, *habendum* from the end of the term granted by the said late Queen, in the said recited letters patent made to the said John Mundy as aforesaid. So that there are several words of reference to the patent misrecited before to be made, 32 Eliz.; *the said letters patent; to the said John Mundy; as aforesaid.*

Hob. 2 Co. 32.

The rule of *utile per inutile* holds only in cases of several and independent clauses, as may appear upon consideration of Stukeley's case, Doughty's case, Dodington's case.

But the same reason that you may vary from the words and term, 32 Eliz. to 42 Eliz., you might vary it, if it had been recited, the lease to have been made to Thomas Mundy, or J. S., whereas it was made to John Mundy, for these were certainties enough of a lease for thirty years, and when to commence; and it had been good enough if the name of the lessee had not been recited: and so it will be, if we vary from the words, and put in and leave out what we please, we shall not know within what bounds to keep.

Another objection hath been made, and much urged; that the lease to Godolphin was *apparently intended* to begin after the end of the lease to Mundy for thirty years, and not before, and that therefore there was a rent of 60*l.* over and above the said rent reserved during Mundy's lease, and 120*l.* after that lease ended; whereas if the lease to Godolphin in respect of the misrecital must be construed to begin presently, he must pay 60*l.* *per annum* presently for nothing, and this lease will end before the other to Mundy.

To this I answer, that it cannot be denied but the intention of the parties certainly was, that Godolphin's lease should begin when Mundy's ended. But I must take up my Lord Hobart's distinction between a mental and a legal intention. The legal intention is to be taken only from the words of the deed. Whilst the words of the deed are such as may be subservient, or not contrary to the intention, they may be extended: but where they are express, and positive, *contra expressa verba nulla fiat interpretatio.* If Judges at common law begin

The legal intention is to be taken only from the words of a deed. Whilst the words of a deed are such as may be subservient, or not contrary to what they may be extended; otherwise when they are express and positive. If Judges at common law begin to recede from the letter of deeds to equitable constructions, upon foreign conjectures and intendments, they will make uncertainty and confusion in the law. This has been done too much of late times.

to recede from the letter of deeds to equitable constructions, upon foreign conjectures, and intendments (which I doubt they have of later times done too much) they will make uncertainty and confusion in the law.

It is here express that this lease is limited to begin after a lease to Mundy made, 32 Eliz. It cannot begin after that lease, for there is none such; you cannot make it certainty. Construe that the true term which Mundy had was intended by it, no term being expressed for which it was granted, you shall not make a limitation of your own, when it shall commence, upon intentions: but take that which the law makes in such cases, which is that it shall begin presently.

It would take up too much time to cite cases to prove, that in deeds no construction shall be made upon conjectural arguments of the intention, which the words will not bear. I will instance but in two cases; and those of former times. The Anderson 29
one P. 29 H. 8., a feoffment was made by A. to B. *de uno campo, et ego præd. A. warrantizabo dictum croftum præd. B. et hæredibus suis.* This was adjudged a void warranty, for the warranty was of a croft, not of a field; and yet the intent was apparent to warrant that which was granted, that is, *campum*; and the words *dictum croftum* imply a reference to that which was before mentioned, which was *campum*, not *croftum*. But, saith the book, this part of the deed concerning the warranty shall be rather taken as void, than to construe it according to the intent not warranted by the words.

The other is 39 H. 6. 10. A case is cited to have been formerly adjudged, and it is there agreed for law.—A. was bound in 100*l.* to B.; and the condition was "that if A., the obligor, did not pay to B. 10*l.* such a day, then the bond should be void;" whereas it ought to have been thus, *the bond to stand good:* and the intention is apparent; but because the words were so, we ought to adjudge according to the purport of the words. And so, if the condition of an obligation be, 39 H. 6. 9.
that if the obligee pay to J. S. 10*l.*, then the bond shall be void. If he pay not the money, the bond is forfeited: and yet the intent was apparent, that if the obligor, not the obligee, paid the money, the bond should be void.

In our principal case the lease to Godolphin being by express words to begin after the determination of a lease made to Mundy, 32 Eliz., and no term is expressed, and there is no such grant, 32 Eliz., you shall not, upon arguments from the intention, make it to begin after a lease made to Mundy, 42 Eliz., for thirty years.

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But that which to me (*d*) seems the greatest objection in this case yet remains to be considered.

Estoppels. A lease which works partly in interest cannot work at all by estoppel. C. C. 45.

In all the other cases that have been put of a lease for twenty-one years, or other term, limited to begin after a lease which was either not *in esse*, or else misrecited, the lease so limited to begin after the other was not void: but though it began from the time of the making of it in point of computation; yet in intent it began and took effect after the true lease expired; so that there was some fruit and effect of it for some part of the term or years, though not altogether such as was intended; and, therefore, such a lease working partly in interest, cannot work at all by estoppel.

But such construction cannot be made here: for if the lease to Godolphin, as I opened it at first, begin (in respect of the misrecital of the lease to Mundy) from the making of it for twenty-one years, then in point of time it begins during the lease to Mundy, and ends before the end of the lease to Mundy, *viz.* in 1659. And so it may be urged that this construction makes it merely void; for it never was any lease at all, nor had the lessors any power to contract during that time.

Estoppels by recital.

And rather than it should be totally void by reason of the misrecital, it was urged that it should be good by way of estoppel; and many cases were cited of estoppels by recitals.

There can be no estoppel by generalities.

As our case in truth is, I conceive there can be no ground for an estoppel to tie up the lessors of Godolphin, or any who claim since under them, that they cannot say that there is no such lease to Mundy, 32 Eliz., for there can be no conclusion or estoppel by generalities.

If I, having but one messuage in Dale, reciting whereas I have a messuage in Dale which descended to me from my father, I grant all my messuage which descended from my father it passeth, though it did not so descend. But if I grant all my land which descended————(*e*)

If I release all my right in all my lands in D., which I have by descent from my father, though I have no lands there but from my mother, nothing passeth. But if my release had been of Whiteacre, which I had by descent of the part of my father, the release is good. So if I lease all my lands lying in such a parish, or which descended to me from my mother, I am not estopped to say, I had no such land there: but otherwise,

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(*d*) The point of estoppel "was much insisted on by Serjeant Maynard, in his argument for the plaintiff," in error. Ventris 84.

(*e*) In the manuscript the sentence ends thus abruptly; a reference in the margin is to Com. 192. Wrottesly and Adam's case.

if it were of Whiteacre, which I had by descent from my mother.

But in our case the recital is general, of a lease to Mundy made 32 Eliz., not mentioning for what term, or when to determine, and so is too general to work a conclusion.

But if it had been (as hath been taken upon the argument) that the lease had been recited to have been made to Mundy for thirty years, to begin immediately after the end of the lease by the prior and convent, it would have had more difficulty in it.

If a lease be made to A. for ninety-nine years, and then the lessor grants to B. for ninety-nine years, to begin after the first lease; and then B. by indenture leaseth all the lands to me for twenty-one years, to begin presently, B. not being then owner of the land (though he had a future interest) I conceive this is a good lease, by estoppel, between the parties. And so if he lease it to me to begin at a day to come, for which he hath no power to contract; when the time comes, it is good between the lessor and lessee by estoppel. As if A. by indenture lease to me lands which are none of his, *habendum* from a day to come; this is a good lease, by estoppel, for that time.

If lessee of a term, to begin after a former term, leaseth all the lands by indenture, for twenty-one years, to begin presently, this is a good lease by estoppel, between the parties.

If A. by indenture lease lands which are not his, *habendum* from a day to come; this is a good lease by estoppel for that time.

But such an estoppel in our case would be of no avail; for if the twenty-one years to Godolphin began, by estoppel, from the making of the lease, then was it ended also before Mundy's lease.

And, therefore, I must put the case further:—Mundy is lessor for thirty years; and the Earl of Holland and others having a future interest for ninety-nine years, to begin after the other; and they, by indenture, reciting that Mundy hath a lease for thirty years, made 32 Eliz. (whereas it was 42) demise to Godolphin the land, *habendum* from the end of the said term made (for thirty years to Mundy) for twenty-one years, which in time expires before the thirty years; this lease, as I said before, cannot be good by way of contract, and therefore must be good by way of estoppel.

But then, how long that estoppel shall continue is considerable.

Much may be said in that case (it not working wholly by estoppel) that both parties shall be concluded to say, that there was no such lease, 32 Eliz.; and so the lease, by estoppel, shall be good for all the time expressed, *viz.* from the end of that lease recited to be made, 32 Eliz., for all the time therein expressed, *viz.*, for twenty-one years from the end of the thirty years after the ninety-six years expired; and ought not to have the same construction as it would have if it wrought in any

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part by way of interest: for it working wholly by way of estoppel, there is no cause to limit the commencement of the term, otherwise than is expressed in the indenture.

And if that were the case here, then the ninety-six years, ending in 1633, the thirty years after the ninety-six years, ending in 1663, the lease by estoppel would then begin in 1663, and would be still continuing during the rest of the twenty-one years from thenceforth yet unexpired.

3 Eliz. 196. 3 Cro. 756. 769. Skipwith and Steed's case. Tr. 42 Eliz. B. R.

It is not strange to our books that recitals work by way of conclusion and estoppel.

If an obligation had been made to the Earl of Holland, &c. with condition, that whereas a lease had been made to Mundy, 32 Eliz., for thirty years, and that the obligee had leased to the obligor for twenty-one years, to commence after that lease to Mundy, and the condition had been to perform the covenants in that lease, I conceive the obligor had been estopped to say there was no such lease.

But, notwithstanding all these objections, I am of opinion that this lease to Godolphin was never a good lease, either in interest or estoppel; not in interest, because it was to commence (if it did commence at all) and end during the continuance of the lease to Mundy. Nor was it a good lease by estoppel; for it appears upon the verdict, that the Earl of Holland and others, the Queen's trustees, who made the lease to Mundy, was seised, not of a future interest barely, but of a reversion for ninety and odd years, to which the rent of 60*l.* reserved in Mundy's lease was attendant; and, therefore, during the lease of thirty years to Mundy, they might contract for the reversion for any lesser term; and such a grant, with attornment, would have carried the rent.

Then when the lease to Godolphin was limited to begin after a lease where there was none such, by construction of law it was to begin presently; and, if there had been attornment, it had been a good lease of the reversion for that term.

And when I make a lease for years of a reversion, and this is not good for want of attornment, this shall never work by estoppel; for the lessor had an interest out of which his grant might have been made good, if the ceremony requisite, which was attornment, had been performed, which belonged not to the lessor to do, or to get done.

But if my Lord of Holland, and other the trustees, had had only a bare future interest, I will not determine whether there had been an estoppel in the case.

As for the estoppel by reason of a recital, there may be a great deal of difference between a conclusion, or estoppel by a

condition in an obligation; and upon a recital in a deed. Our books say generally, such a recital in a deed binds not.

In Miller and Mainwaring's case, and the other cases upon misrecitals, there was never any question made upon estoppel by recital: but the leases held to be good, to commence presently from the making of the lease. But, in truth, much cannot be inferred from these cases; for an interest for some term passing there could be no estoppel at all.

In our case the Earl of Holland, and the other trustees, had a present reversion, and their lease, if attornment had been, would have passed an interest; and, therefore, cannot in any way work by estoppel.

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C. C. 352. b. 35 H. 6. 33. Jo. Crook's case. 9 Co. 9. a. 10, b. Dowman's case.

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Tr. 1659. Rot. 1691.

(Where a moiety of lands was settled "on A. B. *the elder*" for life, with remainder in special tail to "A. B. *the younger*;" and the other moiety was settled on "A. B. *the younger*," in special tail; "and for default of such issue the remainder of the whole premises to the use of the right heirs of *the said A. B.* for ever," without specifying "the elder," or "the younger."—This ultimate limitation was held, *under the circumstances*, to be in favour of A. B. *the younger*.

Where A. is tenant for life of a moiety of lands, with remainder to B. in tail; and B. is tenant in tail in possession of the other moiety, with reversion in the whole to A. in fee;—the *fine* of A. and B. as to both moieties, will enure to *uses declared* by B. alone, to himself in fee. For as to the first moiety, the fine destroyed the reversion; and as to the second moiety, it worked a discontinuance.

The construction of verdict is to be favourable.)

BRIDGMAN, C. J.

Ejectione firmæ by Thomas Harris against William Evans, upon the demise of Richard Powell and Francis Roberts, of two messuages, and 100 acres of land, &c. in the parish of Hyntwardin, for five years, &c.

Harg. MSS. No. 58. fol. 114.

(*a*) The Editor has not met with any reference to this case. The Roll states the judgment to have been given against the defendant, contrary to the opinion of the Lord Chief Justice.

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Upon not guilty pleaded, a special verdict is found :—

That John Whitcott the elder was seised of the tenement in the declaration in fee; and by indenture, 10th Sept. 23 Car. between the said John Whitcott the elder, and John Whitcott his son and heir apparent of the first part, and John Powell and Edward Surford of the second part, and Margaret Powell, and Alice Powell, her daughter, of the third part. In consideration of a marriage to be had between the said John Whitcott the younger and Alice, and for (*b*) 120*l.* the said John Whitcott the elder, and John his son, did grant, enfeoff, and confirm unto the said Richard Powell and Francis Roberts the said two messuages, &c.; to hold to them, their heirs, and assigns, to the uses thereinafter mentioned; *viz.* one moiety to the use of the said John Whitcott the elder, for his life; remainder, after his decease, to the use of the said John Whitcott the younger, and Alice Powell, and the heirs of their two bodies, lawfully begotten; and the other moiety to the only use of the said John Whitcott the younger, and Alice Powell, and of the heirs of their two bodies lawfully to be begotten; *and for default of such issue, the remainder of the whole premises to the use and behoof of the right heirs of the said John Whitcott for ever.* And that livery and seisin was thereupon given, and that the marriage took effect. That afterwards John Whitcott the younger did sign, seal, and deliver, an indenture, dated 10 *Martii*, 1649, found *in hæc verba.* And it is an indenture mentioned to be made between the said John Whitcott the elder and John Whitcott the younger of the one part, and Thomas Bond and Morgan Malpas of the other part, witnessing that for the affection which John Whitcott the younger beareth to Alice his wife, and for that the said John Whitcott the elder, and John Whitcott the younger, are willing to settle the messuages and lands hereinafter mentioned, to the uses hereinafter expressed, and to no other use; and for valuable considerations it is agreed, and the said John Whitcott the elder covenanteth, before Easter next ensuing, to levy a fine to the said Bond and Malpas, with proclamations

J. W. the elder was seised in fee of the tenement in question, by indenture of the 10th Sept. 1648. J. W. the elder, and J. W. the younger, in consideration of the marriage of J. W. the younger, and of 120*l.*. paid to J. W. the elder. He and his son limit the tenement.

As to one half to the use of the said J. W. the elder for life, remainder to the use of the said J. W. the younger, and the intended wife, in special tail. And as to the other half to the only use of the said J. W. the younger, and the intended wife in special tail, "and for default of such issue, the remainder of the whole premises, to the use and behoof of the right heirs of *the said J. W.* for ever."

By "the said J. W." is to be understood J. W. the younger.

John Whitcott the younger alone executed an indenture, of the 10th March, 1649, resettling the tenement, after the marriage had taken effect.

(*b*) This money was paid to the father. See p. 552.

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of the said two messuages, &c., by the names of, &c. which shall be and enure; and the said Bond and Malpas shall stand and be seized, to the uses hereinafter mentioned, and to no other use, *viz.* one moiety to the use of the said John Whitcott the elder, for his life, without impeachment of waste; and after his decease, to the use of the said John Whitcott the younger, and the said Alice, his wife, for their lives, and the life of the longer liver of them, and of the heirs of their two bodies between them lawfully to be begotten; and for default of such issue, to the use of the heirs of the body of the said Alice; and for default of such issue, to the use of the right heirs of the said Alice for ever. And the other moiety, immediately from and after the said fine levied, to the use of the said John Whitcott the younger, and the said Alice, for their lives, and the life of the longer liver of them, and of the heirs of their two bodies, between them two lawfully begotten; and for default of such issue, to the use of the heirs of the body of the said Alice; and for default of such issue, to the use of the right heirs of the said Alice for ever. Which said indenture was sealed and delivered by the said John Whitcott the younger only.

As to one moiety to the use of J. W. the elder for life, remainder to the use of J. W. the younger, and his wife, in special tail, remainder to the use of the heirs of the body of the wife, remainder to the right heirs of the wife.

As to the other moiety to the use of J. W. the younger and his wife, in special tail, remainder to the use of the heirs of the body of the wife, remainder to the use of the right heirs of the wife.

The Jury further find, That, in performance of the covenants in that Indenture, the said *John Whitcott* (*c*) levied a fine in Trinity Term, 1650, the tenor whereof followeth in these words:—*Hæc est finalis concordia inter Thomam Bond et Morgannum Malpas querentes, et Johannem Whitcott seniorem, et Johannem Whitcott juniorem, Deforc. de duobus messuagiis, &c. pro at* by the said fine remaining upon record in the Common Bench, and now here exemplified, &c. appears. And that the said messuages, &c. are the same with those in the declaration; and that the said John Whitcott afterwards, 1 *Augusti*, 1654, died without issue and that Alice survived him; and that John Whitcott the elder entered upon the said moiety, mentioned in the said indenture to be settled upon him during his life, and was thereof possessed, and quietly enjoyed the same. And afterwards, 1 *Januarii*, 1655, by indenture, for 5*s*. bar-

Fine levied, T. T. 1650.

J. W. the younger died 1 Aug. 1654.

J. W. the elder entered on the moiety limited to his use for life.

And by indentures of lease and release of the 1st and 10th days of Jan. 1655, J. W. the elder conveyed the premises to A. and B. in fee.

(*c*) See p. 553.

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gained and sold the premises to Richard Powell and Francis Roberts, for six months; and by his indenture, 10 *Januarii*, did release the same to them and their heirs (being in actual possession by virtue of the said bargain and sale) to the use of them and their heirs.

Alice entered into the other moiety.

That Alice did enter into the moiety limited to John Whitcott the younger, and Alice, for their lives, with remainder as is before limited in the said Indenture, 10 *Martii*, 1649.

J. W. the elder, died 3 May, 1658, and afterwards Alice entered into his moiety.

That 3 *Maii*, 1658, John Whitcott the elder died; and that afterwards the said Alice entered into the other moiety, so limited to the use of the said John the elder, for his life, with remainder to the use of the said John the younger, and Alice, with remainder over, by the said indenture, 10 *Martii*, 1649.

Alice married William Evans, and had by him issue in full life, and died. A. and B. enter, and demise the premises to plaintiff. William Evans afterwards ejects him.

And that afterwards the said Alice, *apud, &c.* took to husband William Evans, and had issue by him in full life, and afterwards *apud, &c.* died. And that the said Richard Powell and Francis Roberts, the lessors afterwards and before the trespass and ejectment, &c. did enter and demise to the plaintiff *pro ut*, by virtue whereof he did enter, and was possessed until the said William Evans, afterwards the said first day of April, &c. did enter and eject him *pro ut, &c. sed utrum, &c.*

[This case was argued by Glyn *pro querente*, and Beare *pro defendente*; and after by Earle *pro querente*, and by Keelinge *pro defendente*.]

The first point is this: the remainder of the whole being limited to the *right heirs of the said John Whitcott for ever*, (not mentioning the *elder* or the *younger*) whether John the *elder* or John the *younger* be the party to whose right heirs it be intended. And I conceive John the younger is the party.

For, first, the words limit "the *remainder* of the whole to the right heirs of the said John Whitcott." If it be a remainder, it must be to the right heirs of the *son*; for if it be to the right heirs of the *father*, it is in its own nature a *reversion*, and not a "remainder," the estate originally moving from the father. So that the propriety of speech carries it to the heirs of the *son*.

Secondly, The intent of the parties in the limitation itself seems to be so. As to the one moiety no estate is before limited to the father: but an estate is limited to the son of both moieties; then the remainder of the whole is limited to the "right heirs of the said John."

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It were an improper limitation to limit it to the right heirs of one to whom no estate was before limited in it: and it was not intended to sound in contingency; which it must do as to a moiety, if the words of *remainder to the said John* be referred to the father; for then as to that moiety it is to be construed as an express limitation to the use of John the son, and Alice, and the heirs of their two bodies, remainder to the right heirs of John the father.

Limitation to the right heirs of one to whom no estate before limited by the instrument improper.

It is very true, in such case the law makes it a reversion; for the law creates a use unto him during his life, as it is resolved in Fenwick's and Mitford's case, 2 Co. 91. b. and C. C. 22. But that was but a late resolution; and we here consider not what is the operation or construction of law upon the words, but what is the intent of the parties.

Deeds ought to have simple interpretation.

Deeds are the acts of laymen, and ought to have simple interpretation.

Here he limits it to the heir, not to the ancestor, which seems improper where the ancestor does not take before.

Limitation to the heir of an ancestor where the ancestor does not take before improper *i. e. improper if it be meant to make the ancestor a purchaser.*

Thirdly, It is to be observed, that the word "*dictus*" or "said" is several times repeated in the clause of limitation of the uses; for the limitation is, *as to one moiety to the use of John Whitcott the elder for life, remainder thereof to the use of the said John Whitcott the younger, and Alice, and the heirs of their two bodies; and as to the other moiety, to the use of the said John Whitcott the younger, and Alice, and the heirs of their two bodies; remainder of the whole to the use of the right heirs of the said John Whitcott for ever.*

"*Said*" and "*same*" differ.

I conceive this last "said" must be the same that the other said is.—The rule is general: *relatio est ad proximum antecedentem nisi impediatur sententia;* (see Moor's Reports 325, 326. Englefield's case for "*prædict.*") If it had been remainder of the whole to the right heirs of the "same" John Whitcott, it had been clear it must be meant of him that was last named, C. C. 20. b.; for *idem semper proximo antecedenti refertur.*

"In *formâ prædictâ*" and "*in eâdem formâ*" differ.

But the objection is the word "*prædict.*" goes to all; and, therefore, it is objected. If lands be given to A. for life, remainder to B., and the heirs of his body in tail, remainder to C. *in formâ prædictâ*, this remainder is void for the uncertainty; for "*prædicta*" reacheth to all, but "*in eâdem formâ*" reacheth to the last; C. C. 20. b. Admit this to be law, yet it differs from our case; for in our case here is a former *prædict.* to guide and govern it, "*prædicto Johanni the younger:*" but in that case the construction was equal, whether "*in form. prædict.*" shall be "*in form. prædict. as A.*" or "*in form. prædict. as B.* had it." But put the case, it had been to A. for life, remainder to B. *et hæredibus masculis de corpore B.*, re-

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mainder to C. *et hæredibus suis in formâ prædictâ*, there it must refer to the limitation to B. The word *heirs* was not in the first limitation, but was in the second; and, therefore, the *third* shall be guided by it. And so in our case, there was a former "*prædict.*" to guide it by; the word was applied immediately before to John Whitcott the younger.

But this is said upon supposition, the word was "aforesaid" or "*prædict.*;" but here it is, "the *said* John"—"said" not "aforesaid;"—"*dictus*" not "*prædictus.*" *Præ* is a preposition, and in many respects is in legal construction the same as *præ antea*; as *præmissa, præ antea missa; præmentionata, præ antea mentionata*; and so takes in *all* before. But "*dictus*" hath not so large an extent: but, as I conceive, very strongly relates *ad proximum antecedens si sententia non impediat*; as it doth not in our case.

"*Præ* is in many respects in legal construction the same as "*præ antea.*"

Difference of *dictus* and *prædictus.*

Fourthly, For the argument from the intent; we cannot draw it but *ex visceribus textûs*, and I shall enforce it no further. Here is a settlement by the father upon the son's marriage, and for a portion by the son's wife; this is the consideration; the son hath an estate tail in the whole, so that he had power over the fee; and the reversion is not assets, nor considerable in law: but if the son should survive the wife, he that had power over the whole during his wife's life, shall it be understood, if his wife die, whose portion paid for his estate, that now his children by a second wife should not have it?

Reversion after an estate tail not considerable in law.

I conceive it a more reasonable construction, the father having the son's portion, the son should have the inheritance. But I rely not upon that, but as a retort upon the objection on the other side drawn from the intent.

Two of one name, the younger shall bear the addition.

I agree to all the cases that have been put; where two are of one name, the younger shall bear the addition; and where one alone is named, it shall, *primâ facie*, be understood of the elder. But those come not home to our case; they are to be so taken in case of writs and outlawries, and where new writs may be had if the addition be not right. But in case of grants it is otherwise. If lands be limited to the use of J. S., and there be two of that name, J. S. the elder, and J. S. the younger: if it cannot be made appear who was the party intended, it shall be void for the uncertainty; and it shall not go to J. S. the elder, because he needs no addition. And so is Peynell's case, 47 E. 3. 16; and also the opinion 5 Co. 68. in my Lord Cheney's case, where that case is cited. A man, having two sons named John, deviseth or rendereth by fine to his son John. The law will make neither the one nor the other to inherit by construction; for neither the eldest shall have it, because he needs no addition; nor the younger, because the father,

Limitation of lands "to the use of J. S.," there being two of that name, void for uncertainty, in a grant, will, or fine.

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need not to have limited it over if he intended the eldest; but the will or fine, if the intent appear not, shall be void for uncertainty.

But on the other side, where a certain construction can be made of the words in the deed, it is injustice to make it void: it was the intent of all parties this fee simple should be settled by the deed; and, therefore, there is a limitation by the deed of a remainder to the heirs of the said John; which limitation, I conceive, must be meant to the heirs of the son for the reasons I have given.

Where a certain construction can be made of the words in the deed, it is injustice to make it void.

First, because it is limited as a "remainder," whereas the father and his heirs, if he take by it, must take as a reversion.

Secondly, it is limited not to John but to "the right heirs of John;" which is improper where John takes no estate by the limitation to himself, as the father doth not in part of the land.

And, thirdly, the words precedent, "the said John," being express of John the son, and that time immediately before this limitation, I conceive they are sufficient to direct the subsequent words, "the said John," to be the same John last mentioned.

So that I conclude for my opinion, the fee simple was in John the son, and consequently no cause of action for the plaintiff; for John the elder being dead, and John the younger and his wife, being both dead without issue between them, whereby the first estate tail is spent, the plaintiff who derives from John the elder, having no title to the inheritance, as I have argued, can have no title at all.

But taking it,—by admittance,—that the law is otherwise in this point, and that John the father had the fee simple in the whole, the next point that hath been debated in this case is upon the operation of the fine levied by John the elder and John the younger. John the elder being tenant for life, remainder to John the younger and his wife in tail, with reversion to John the elder in fee, of one moiety; and John the younger and his wife being tenants in possession in tail, with reversion to John the elder, in fee of the other moiety; John the elder and John the younger levy a fine, and John the younger, by indenture, declares the use of this fine,—whether shall the declaration of uses bind the interest of John the elder; —and I conceive it shall.

A. being tenant for life of one moiety of lands, remainder to B. and his wife in tail, with reversion to A. in fee; and B. and his wife, tenants in tail in possession, with reversion to A. in fee of the other moiety. The fine of A. and B. good against A. although B. alone declared the uses of the fine.

I must agree, if two joint-tenants levy a fine, and one of them by indenture declare the uses of the whole fine, yet this

Two joint tenants levy a fine; the declaration of the use by one of them affects one moiety only of the lands.

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directs the use as to one moiety only; for that the conusor had no right but to a moiety. Argol and Cheney's case, Latch's Rep. 71.

The declaration of the use of a fine follows the ownership of the lands.

So if A. being seised, joins in a fine with B. who hath nothing, the declaration of the use by B. shall not bind, for the declaration and disposition of the use follows the estate and ownership of the land *tanquam umbra corpus;* and it differs from the case of the declaration of use by the baron alone, of the wife's land, where the wife doth not dis-assent; which is grounded upon a special reason relating to the coverture, 2 Co. 57., Beckwith's case.

Resulting uses.

And as the law is thus where there are several inheritances, so I must agree in many cases where he who hath a particular estate, as tenant for life, and he in reversion join in a fine, though the old estate for life is gone, yet if there be no declaration of use, the use shall return back to the tenant for life, and the fee to him in reversion, 2 Co. 58. Beckwith's case; and though I know no express authority in it, where tenant for life and he in the reversion or remainder join, and he that hath the fee declares the use of the whole, that yet the tenant for life shall have an estate for his life; yet I shall admit the law to be so; and that it is the same where tenant for life and he in the reversion levy a fine, and he in the reversion only declares the use of the fine, as where no use is declared by either of them; for the tenant for life is not privy to the declaration of the use by him in the reversion; and, therefore, it shall not bind him.

A. tenant for life, remainder, or reversion to B. in fee levy a fine; declaration of the use by B. does not bar the estate for life in A.

The reason of these cases of the resultancy of the use, where he that hath the particular estate, and he in the reversion, join in the fine, and no declaration is made of the use, is given in Beckwith's case, that the use results to the tenant for life, and to him in the remainder or reversion, as they had it before; for every one grants that which he may lawfully grant; and every one shall have the use which the law vests in them, according to the estate which they grant over.

Every one is presumed to grant that which he may lawfully grant.

Uses shall result to grantors, according to the estates which they grant.

But our principal case is out of both these reasons; for, first, the tenant in tail doth not grant what he may lawfully grant; for I hold this fine is a *discontinuance.* In Baker and Hacking's case, 11 Car. B. R. 1 Cr. 387. 405. tenant in tail, the reversioner in fee, join in a lease for life with livery. It was adjudged a discontinuance, for the tenant in tail hath gained a new fee; and it is all one as the case, 13 H. 7. 14. tenant in tail, remainder to his right heir, makes a feoffment; it is a discontinuance.

The reason is the same where tenant in tail, and he in the reversion, levy a fine; for the fee moves from the tenant in

tail, who had the inheritance before. In Bredon's case, tenant for life and he in the remainder in tail join in a fine; it is agreed it is no discontinuance, because the possession moves from the tenant in tail.

In my Lord Clanrickard's case, Hobart 278. feme tenant in tail, the remainder to my Lord Clanrickard, her husband for life, levy a fine; this was a discontinuance of the entail, though the Earl, tenant in remainder for life, joins.

It is true, in that case, though a fee passed to the conusee, yet the estate in remainder for life passed from the conusor; so that though the estate tail were spent, or the fine reversed, *quoad* the tenant in tail, yet the estate for life did continue, in the eye of the law, not forfeited: but the reason was, he that made the discontinuance had that remainder; and whiles the discontinuance lasted, there was no use of it. When the discontinuance was avoided, there was no forfeiture; for all the time of the fine levied, an inheritance was also conveyed, as in English's case. In our case it is otherwise; the discontinuance remains, the bar by the fine remains, and the reversion and the tail were in several persons.

If tenant in tail, reversion to him in fee, levy a fine, a fee passeth. Whether out of the fee raised upon the estate tail alone, as I conceive it doth, or out of the absolute fee also, will not be material, for a fee passeth: but where they are in several persons, then the fee passeth wholly to the conusee from the tenant in tail. In my Lady Argall and Cheney's case, B. R. Latches Rep. fol. 71. the father was tenant for life, remainder to the son in tail; a fine was levied by both, and an indenture was between the father and others, declaring the use of this fine: but the son was no party to it, nor proof of his consent to the declaration of the uses; and, therefore, it being upon a trial at bar, the Court directed the Jury to find the uses according to the estate which they had before. The question there was, not whether the son had a fee or an entail, that was not the question: but whether the uses declared by the father did bind the son;—which it was agreed they did not. But I hold in that case, as I do in our principal case, that upon the fine by tenant in tail the use resulted to him, instead of his estate tail, as a fee simple, but as a fee simple determinable, where there was not a bar or discontinuance in the case.

If tenant in tail, *remainder* to him in fee, levy a fine, a fee passeth. The fee is raised out of the estate tail.

And that is the second reason why, I conceive upon this fine by tenant in tail, and the reversioner in fee, no use being declared, the use results in fee to him that was tenant in tail; and consequently his sole declaration of use shall bind. For that is another ground in Beckwith's case; where tenant for life, and he in the reversion in fee, join in a fine, the use shall result

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according to their former estate, to the tenant for life, and to the reversioner in fee; for every one shall have the use, according to the estate *which they grant over:* so are the words of the book. But the tenant in tail, though he had the tail, yet he could not grant it over. The estate which passed from him by his grant to the conusee was a fee; and, therefore, if the use must result according to the estate granted, it must be a fee also.

The estate which passes from a tenant in tail to the conusee in levying a fine is a fee, and he cannot grant.

The estate tail, therefore, if the use must result according to the estate granted, it must be a fee also.

It is true in the other case, where tenant for life and he in the reversion levy a fine, in the conusee the estate is one entire fee: but yet the estates granted were the estates for life and the remainder in fee, and the uses shall result according to the estates granted. But where tenant in tail joins, the old use of the entail cannot result; for if an use in tail should arise out of the fine, there must be another donor, and not the first; and *another* entail, and not the old. And if there be tenant in tail with reversion in fee, and the tenant in tail alone make a feoffment or levy a fine, the use clearly resulted to the connsor in fee; for a fee passed. *Pari ratione* where tenant in tail and he in the remainder or reversion join; for, as I said before, the fee moved from the tenant in tail; he had the inheritance, which was a fee simple at the common law. And the reversion expectant upon it, as it is not assets at law, so neither is it valued, as I said before: it hinders not a discontinuance.

When tenant in tail joins in levying a fine, the old use of the entail cannot result.

I know no authority in this case; only I remember in 11 Car. when I was a young barrister, I heard it was the opinion of my Lord Coventry and all the practisers in Chancery, that where tenant in tail, and he in the remainder in tail, and all others in remainder joined in a fine without declaring the uses, the use of the fee entirely resulted to the tenant in tail, from whom the inheritance first moved, and his heirs.

And that opinion is agreeable with the reasons I have given; so that I conclude as to one moiety John Whitcott the younger, being tenant in tail in possession with his wife, and having power to discontinue the tail, when he and his father, who had the remainder expectant upon the estate tail, join in a fine, and John Whitcott the younger, who hath the estate, alone declares the use of the fine,—this is a good declaration; for if he had declared no use, it would have resulted to him and his heirs.

It may further be a question as to the other moiety, because the case is different; for there John the elder was tenant for life, remainder to John the son, and his wife in tail, with the reversion (by admittance—*posito, sed non concesso,*) to John the elder and his heirs; John the elder and John the younger join in a fine, and John the younger declares the use of it.

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In this case John the younger could make no discontinuance; nor was there any discontinuance as to this moiety in the case, as is resolved in Bredon's case, 1 Co. 76.; and thereby the use will result as to this moiety (if it had *not* (*d*) been so limited as it is by the indenture) to John the father for his life; and yet should in this case also. The declaration of the use by the son who had the inheritance binds; for the estate tail, *quoad* John the son, and the issue between him and Alice, being barred by the fine with proclamations, and a new fee created, the use shall result back in fee. A new estate in tail cannot arise, for a fee passed to the conusee; no intent of the parties appeared that it should arise; there must be a new donor; and the fee, if it should return to John the elder, must be a remainder, and not a reversion; for there must be a new donor. So that though there be no discontinuance, yet the reason will be the same,—an use in fee simple will result back to John Whitcott the younger, who was tenant in tail; and there shall not be a fee upon a fee by limitation of use. By devise, or contingency, or escheat, it may arise perhaps in some cases: but not by direct limitation of use. So that I conclude this point also,—Admit the fee simple had vested in John the father, yet joining in the fine with the son who had the entail (though jointly with his wife) the declaration of use by the son alone having the inheritance, was sufficient to declare the use of the whole. And the consequence of that is,—John the son having declared the use to his wife and the heirs of her body generally, William Evans the defendant, her second husband, hath title as tenant by the curtesy.

There shall not be a fee upon a fee by limitation of use. By devise, or contingency, or escheat, it may arise perhaps in some cases.

And, thirdly, it was objected, and that was the last thing moved in this case, that it doth not appear by this verdict that John Whitcott the elder joined in the fine; for by the verdict it is expressly found that John Whitcott the younger levied a fine. And it doth not say that John Whitcott the elder levied the fine; and the fine is found *in hæc verba*; whereby it appears that John Whitcott the elder and John Whitcott the younger levied a fine to Malpas and Bond, conusees, according to the indenture sealed by John the younger.

I must agree clearly that which was alleged at the bar,—that it was not the intent of the jury to find, whether John the elder levied the fine or not. I find upon the whole matter, that the jury thought it hard the inheritance should go to a wife and to strangers; and therefore found not so much as to my opinion upon the evidence, as it appears to me they might have found: but I think they have found enough to satisfy the Court that

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(*d*) "*Not*" is here added to the text by the Editor.

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John the elder levied the fine; for they have found the fine levied by John the younger *in hæc verba*, and the record is entire. It is a fine levied by John the elder and John the younger. It is most certain upon this verdict a fine was levied by two. It is as certain by the verdict, that John the younger was the same John the younger who is before mentioned; for it is so found by the verdict. Then by the same reason that John Whitcott the younger, named in the fine, must be the same John Whitcott the younger who is named in the verdict;—by the same reason, I say, John the elder must be the same John the elder. First, because *non præsumitur pluralitas*. Secondly, he is called John Whitcott the younger in reference to John the elder. It shall not be presumed there is another John the elder, without some other addition of place, mystery, or degree; and therefore he shall be understood to be John the elder. Besides they are the same conusees who were mentioned in the indenture,—Bond and Malpas.

In verdicts, the law will be favourable in the construction.
A recital in an indenture found by a verdict is evidence of a fact so recited.

In verdicts the law will be favourable in their construction. If a verdict find an indenture wherein any matter of fact material is but recited, and not particularly found, the law will take the recital to be true as if the fact were found. (So upon a return of a *habeas corpus*) *a fortiore* in the recital of a record; for what had any other John Whitcott the elder to do with those lands whereof the fine was levied and the indenture sealed but this John Whitcott? So that I conclude, that it was this John Whitcott the elder who did join in the fine.

It is objected, it may be another John Whitcott the elder; and, being matter of fact, we ought not to attaint a jury by implication.

But that objection rests upon a "may be," and therefore it may be also John Whitcott the elder. Still it makes against the plaintiff: for if it be material whether John Whitcott the elder joined in the fine, and it doth not sufficiently appear by the verdict that he did join in the fine; then, I say, neither doth it appear by the verdict that he did not join in the fine.

It was John Whitcott the elder that joined in it. Whether this John Whitcott the elder were another or the same (if the objection stand) will be the question; and then, it not appearing clearly which John Whitcott the elder joined in the fine, the verdict is imperfect; and so still the case is the same, as to the action no judgment can be given for the plaintiff.

But there was another objection moved, and but moved, at the bar by my brother Earle, for it was not argued.

It doth not appear that this fine was with proclamations; and Alice the wife took by moieties, the use being settled before the marriage, and she surviving, she was remitted; and if

John the elder did not join in the fine, then there was a remitter to him also. However, the fine could not discontinue the entail, but as to a moiety of that moiety whereof John Whitcott the younger, and his wife, were in actual possession, though it were a discontinuance of the estate for the entire moiety, because he was seised of the other part in his wife's right.

I do agree, as this case is, that the feoffment or fine of the husband where lands are given to or to the use of the husband and wife, (before marriage) and to the heirs of their bodies, is no discontinuance. (I say not of the estate) but of the entail for more than one half of the land so settled; for the wife had the other moiety, not the husband. For though it be limited to the heirs of their two bodies, yet several moieties may be of an estate tail as well as of a fee simple between baron and feme. And so it was expressly agreed in Symon's case, Tr. 10 Eliz. C. B. Moore 92. However, the wife and the husband only as in her right, having the freehold of the moiety of the moiety, the estate tail was not so actually in the husband as to discontinue the tail.

Where lands given to or to the use of the husband and wife (before marriage) in special tail, the fine or feoffment of the husband is no discontinuance of the entail for more than half of the land so settled. Several moieties may be of an estate tail as well as of a fee simple between baron and feme.

But I shall not enter into the debate of the consequences of this objection for it is found by the verdict that the covenant was to levy a fine with proclamations; and the Jury expressly find that in performance of the covenants in the indenture John Whitcott the younger levied a fine; and though the proclamations are not found *in hæc verba*, yet the Jury found the fine with a *pro ut per exemplif.* and *pro ut per record.* in the Common Pleas. So that the verdict, if it were needful, may be amended by the record which hath proclamations. And where there is a bar to the entail, there is no remitter to the reversion by the statute 32 H. 8. Besides, as I have held, John the elder had not the fee simple; and if he had it, yet it appears it was the same John who had the fee who levied the fine, against which he could not be remitted to his reversion. And so the case of remitter, and the wife's taking by moieties, will not be considerable in this case.

The record being *referred* to the verdict may be amended by it if need be. Where there is a bar to the entail, there is no remitter to the reversion by the statute 32 H. 8.

That estate of the wife which was made before marriage, and the tail to the issue of her and her husband, John Whitcott the younger being spent, and all the questions now arising upon the estates derived out of the fee simple, so that I conceive by the uses of the fine, the particular estates being spent, Alice the wife of John the younger had an estate to her and the heirs of her body; and having issue by William Evans, the defendant, her second husband, he is entitled to the possession as tenant by the curtesy; and judgment ought to be given for the defendant.

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MEREDITH *v.* WEBBER. (*a*).

(Where a testator gave "all his fee simple lands wheresoever" to A. B., and his heirs, and from one part of the will it was necessarily to be inferred that the word "lands" must comprise *tithes*, the same construction of the word "lands" shall be applied to another which would not, alone, have supported the same inference.
Distinction between the construing of wills and grants.
Distinction between an implication upon an implication, and an explanation of one part of a will by an implication upon another part.
Conditions.)

Harg. MSS. No. 57, fol. 152.

BRIDGMAN, C.J.

I think judgment ought to be given for the defendant. The point in question upon this will is but singly this, whether the tithes in Comblory now in question do pass by the devise of *all his fee simple lands* to John Saunders, and his heirs.

The devise is in these words:—"If my wife be delivered of a daughter, (as she was) I devise all my fee simple lands whatsoever to John Saunders, my brother, and his heirs for ever, upon condition that my wife shall hold and enjoy my free lands at Holford, during her life, after the decease of Margaret Saunders, my mother." The doubt arises because, when he made his will, he had houses at Comblory, which were sufficient to satisfy the words "lands" in the will: but he had no lands in Holford. But he had tithes, and those in the occupation of his mother, Margaret, for life; and he had copyhold lands in Holford at the time of his death, as to which, though upon the verdict it is not found that he had them when he made the will, yet it appeareth that he died shortly after making of his will; for his wife was *ensient* when he made it, and was delivered after his death. And the truth of the case as I conceive is, that he had copyhold lands in Holford when he made his will; though I think it not material to our case, whe-

Semble, that where a testator implies in his will an intention to buy lands, and the general words of the devise comprise them, those lands shall pass, although bought after the making of the will.(*b*)

(*a*) No report of this case appears to have been printed: but it is alluded to in Acherley *v.* Vernon, 9 Mod. 74., and 10 Mod. 525; and the first point argued upon here was determined pursuant to Sir Orlando Bridgman's opinion in a case which his Lordship mentions; and which is reported in Styles 261—278., and 1 Roll. Ab. 613. 8 Viner 116, pl. 4.

(*b*) These positions have been overruled in Brunker *v.* Cook, 11 Mod. 128., and Archer *v.* Bokenham, *ib.* 163. where Holt, C. J., and Trevor, C.J., explain the case from Plowden; and deliver elaborate judgments on the question. See Jones *v.* Roe, 3 T. R. 95. Longford *v.* Pitt, 2 P. Wms. 629. Whittaker *v.* Whittaker, 4 B. C. C. 35; and Broom *v.* Monck, 10 Vesey 604.; and see 1 Lord Raymond 438., the case of Lord Chief Justice Saunders' will.

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ther the copyhold were purchased after the will, or before. If he purchased the lands after the will made, he dying within a few days, it will be understood by his mentioning his free lands that he then had the copyhold lands in Holford in his eye to buy them: for by mentioning free lands, it imports he distinguished them from copyhold, and so the will hath influence upon the copyhold. In Brett and Rigden's case, Com. 344. a. a stronger case is put, if it be law: a man devises lands certain, as the manor of Dale, or Whitacre, to J. S., and after purchases it, it shall pass; for it shall be taken that his intent was to purchase it. (*c*)

But whether the law be so or no, in our case we make no further use of the words "free lands" expressed in the will, but for explanation of the former part of the devise; and whether copyholds were then purchased, or intended by him to be purchased, either case will serve to shew his intent was to distinguish between *free lands* in Holford and *copyhold* there.

So that the discussing of this case requires a twofold consideration:—first, Whether by the devise of "all his fee simple lands" to John Saunders, upon this condition, "that his wife shall hold and enjoy his *free land* in Holford," any tithes at all, even those in Holford, can pass.

And, secondly, Admitting the tithes in Holford do pass by the devise of *all his fee simple lands* by reason of the latter words, "on condition his wife shall hold and enjoy his *free land* in Holford," contrary to the propriety of the words; yet whether those words mentioning only, *Holford*, they shall cause the former devise to be extended to the tithes also in Combflory now in question.

And truly, though the tithes in Holford be not now in question, yet the resolution of that point is absolutely necessary to the determination of the other; for if those tithes in Holford do not pass, without question those in Combflory cannot pass. And yet admitting those in Holford shall pass, it is not so conclusive as to the tithes of Combflory: but it will require a sound consideration whether they pass or not.

And, first, I conceive that the tithes in Holford do pass by this will.

We are upon the case of a will when not the propriety of the words but the signification of them agreeable to the intent of the testator appearing in his will is to be taken. Many cases have been already cited at the bar, and many more may be cited to shew that the propriety of the words shall be subdued and brought under the intent of the testator.

In the construction of a will the signification of the words according to the intent of the testator appearing in his will, is to be taken, not the propriety of the words. The propriety of the words shall be subdued and brought under the intent of the testator.

(*c*) See the preceding Note.

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Lands may pass by words in a will, which properly do not signify lands; and other things may pass by the word "lands," which in a proper or legal signification are not lands.

In many cases lands will pass in a will by words which properly do not signify lands; and other things will pass by the word "lands" in a will which in a proper or legal signification are not lands; as 2 Cr. 104, Kerry and Derrick's case, by devise of his *rents*, his reversion of the lands as well as his rents passed;—2 Cr. 649, Rowland and Doughty's case, by the devise of his *living*, all his lands as well in reversion as in possession passed;—and so by devise of his *livelihood*, Owen, fol. 30.

So in a will by the general word "lands" other things may pass. In Ewer and Heydon's case, Owen's Rep. 75., Popham put the case, that if a man had a rent issuing out of other lands, by a devise of his land the rent passeth; and this was also agreed, 20 Eliz., by Dyer, Manwood, and Mounson. And "*terra*," which is the legal Latin word for land, hath a various acceptation; sometimes for *omnia terrena*, or *super terrâ*; as *terram dedit filiis hominum*;—*laudate dominum, omnes terræ*; there it is taken figuratively: we translate it, "all ye lands," that is, *all inhabitants on earth*: but in our legal sense *terra* is taken sometimes for *solum*, soil or ground; sometimes for any real inheritance, and comprehends tenements, tithes, common, generally; as in a warrant of attorney *in placito terræ*; and sometimes for arable only, as in fines *de quadraginta acris terræ, centum acris prati, &c.*; and in a vulgar acceptation land is many times taken for all a man's annual revenue, be it lands, tenements, tithes, or other hereditaments; and tithes are not so wholly heterogeneous from land, but that they may pass by a will of lands, if the intent of the testator be so. I mean such an intent which the will itself and necessary consequences thereupon imply, not a bare conjectural intention.

The construction of a will must be governed by such an intent as the will itself and necessary consequences thereupon imply, not a bare conjectural intention.

In common acceptation, as I said, lands are often taken for all a man's real estate, or annual revenue. If the question be put, How much land hath he? Resp. 400*l.* a year; that is a proper answer; and yet the value is answered, not the quantity or the quality of his estate. But in this computation we shall reckon tithes, rents, profits, a *prendre* or *render*, any thing whereof he hath a freehold or fee simple estate; and tithes *impropriate*, and in a layman's hands *quoad juris effectum* are as lands; and a *formedon* or other real action or common recovery may be brought of them; and the warrant of attorney shall be in *placito terræ*, as I said before. An *eject. firmæ* lies of them, and so they are comprehended in the word "*firmæ*;" and an indictment upon the statute of forcible entries, within the words "entry upon lands and tenements," lies of them, 1 Cr. 201.; and an assize lies *de possessione decimarum*, yet it is brought *de libero tenemento*; and to say truth, tithes (though the original right of them was in their nature spiritual) yet in

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permancy quoad usum fructum, even in the hands of spiritual persons they were temporal, and part of the product of the land, and in a manner concerned lands. *A fortiore* where the right of them is also temporal, and made a temporal inheritance by statute, they may very well in a will pass by the name of lands if so intended; and "if the words be *satis apta*, though not *consulta*," (as Justice Walmesley said, 3 Cr. 745. in Shayland's case,) "they shall be construed in a will according to the intent."

And in Hil. 20 Eliz. C. B. (I have the report from my brother Browne,) a man had the rectory of Dale in fee, consisting of glebe and tithes, and he had not other lands; and he devised *all his lands in Dale*. And Dyer, Manwood, and Mounson, all held that the whole rectory passed; for parsonages appropriated since 37 H. 8. are become lay fees to all purposes; and by Manwood "it is freehold," and therefore it passeth as a rent charge passeth, by the name of all his lands; for it is land in its nature, which case seems to me a much stronger case than our principal case; for there the glebe lands (without the tithes) might have satisfied the words of the will.

Construction of wills and deeds distinguished.

But this literal and favourable construction is to be made only in wills. The law would have been otherwise in a grant; and in our principal case I agree, if the testator had by deed granted *all his lands whatsoever*, nay, *all his lands in Holford*, though with such a proviso as this is, and that he had nothing then but tithes, yet the tithes would not have passed; for where a man hath time to dispose of his estate, and he doth it by deed, he must attend as well to the propriety of the words by which he conveys, as to his intent; and, therefore, the difference holds good in the case of a grant. When the words may properly carry two sounds according to the genuine, or the legal propriety of the words, I shall expound the words in the most proper and vulgar intendment: but if the intent appear otherwise, I shall expound them in that sense of the words, though less proper, which is congruent to the intent of the grantor, appearing in his deed; but I shall not ordinarily carry them to another sound varying wholly from the propriety of the words.

Construction of words of two significations.

In Ewer and Haydon's case, cited at the bar, in 39 & 40 El. B. R., now in print in Croke's last report 476, 658., the case was,—Haydon seised of lands and houses in Launton, in the county of Oxford, and of lands and houses in Watford, in the county of Hertford, devises to J. S. *all his messuage and lands in Launton, in the county of Oxford, and all other his lands, meadows, and pastures, in the county of Hertford*, omitting "houses." And adjudged the houses in Watford passed not; and affirmed upon a writ of error in the Exchequer Chamber,

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1 Cr. 202.

the general intendment of the words "lands" in the clause touching Watford was restrained to arable lands, and excluded houses. Carter and Ringsteed's case, 8 Co. 118., in Banham's case, and 9 Eliz. 261. are to the same purpose; but I cite this because it was affirmed in error; so in the case cited out of Rowe and Bartlett's case, 1 Cr. 202. (*d*) But in truth it was the resolution taken in Bracebridge's case, Com. 423, 424. A man deviseth *all his lands in Dale*, and he hath only a term for years—then it passeth, for it is an estate in lands: but if he had other lands there, it doth not pass, for there was sufficient to supply the words; and then by the vulgar intendment by the word "lands" is meant a freehold estate or inheritance: but in case of a grant, though the intent appears, yet the grant shall not carry any thing for which there are not significative words. To draw nearer to our case. If a man had granted all his lands in England to A. upon condition that J. S. shall enjoy his lands in Dale during his life, and he had nothing in Dale but tithes, and had lands and tithes in other towns, I conceive no tithes at all either in Dale or elsewhere, would have passed; yet his intent appeared by the words of the condition he meant tithes: but in a grant, as I said then, must be proper and significant words upon which the Court must make construction, and not the intent.

By the vulgar intendment the word "lands" means an estate of inheritance, or freehold.

Semble, that if one grant all his lands in England to A. on condition that J. S. shall enjoy his lands in Dale during his life, and he had nothing in Dale but tithes, and had lands and tithes in other towns, no tithes at all pass. In a grant there must be proper and significant words upon which the Court must make construction, and not upon the intent.

If the intent appear in a will, construction is to be made accordingly contrary to the grammatical and legal sense of the words.

In a will words of condition are to be construed as words of limitation; and *vice versa*.

In a will wordscopulative are to be construed as disjunctives, and *vice versa*.

In wills words may be narrowed from their usual meaning, or they may be extended beyond it to meet the intentions of the testators.

But now in the case of a will, if the intent appear, I shall construe the words according to the intent, contrary both to the grammatical and legal sense, as words of condition for words of limitation, and words of limitation for words of condition, copulative for disjunctive, disjunctive for copulative, and the like. And it is all one in construction of law to take away from words what they properly signify, as in the cases which I have before cited, where the word "lands" is restrained from its genuine to a more narrow sense, and to stretch them further than naturally they signify by extending them as far as the testator intended.

But of this learning so much hath been already said, that I mispend time by giving instances. So that in our case the question is only what is the intent of the testator; and I take it with some clearness, that he intended the tithes of Holford should pass to John by the devise; for he had no other *free land* there but tithes, and Margaret, his mother, held nothing but tithes; and the demise is of "all his fee simple lands wheresoever, to his brother John Saunders, upon condition that his wife shall enjoy his

(*d*) Query, Bartlet *v.* Rhodes, cited in Styl. 293. 8 Viner 297.

free land in Holford after the decease of his mother." The condition that his wife shall enjoy his free land in Holford is a restraint upon John. Now what cause was there for the testator to restrain John as to Holford by the condition, unless he were concerned in Holford by the devise. In Sunday's case, 9 Co. 127, "he devised to his wife for life, and after her decease his second son William to have it; and if William marry, and have any male issue, then his son to have it; and if he have no issue male, then Thomas to have it; and if he marry and have issue male, then his son to have it after his decease." It is the resolution in that case "that William and Thomas Sunday had an estate to them and the heirs male of their bodies," yet the estate is devised to them and to their sons,—because there was a provision in the will "that if they or any of the heirs male of their bodies aliened, then their estates should cease;" and the reason is there given, that "*every restraint, especially in wills, implies that the parties had power to do that which is prohibited, if the restraint had not been.*" And in Shayland's case, 3 Cr. 745., a man having children by two venters, devises lands to those of the second venter, *viz.* to John and Francis, his sons; and if they, or either of them, or their heirs, did sell the same, that it should revert to the whole heirs again. By the first words they would have had the estate only for their lives; it was adjudged that John and Francis had a fee in respect of the words of restraint to the heirs from selling, though it was void as a restraint.

Words void in their direct intent, may point at the meaning of a testator.

So that it must necessarily be enforced here, that by the first part of the will, according as the testator intended it, John Saunders might have hindered the testator's wife from having or enjoying the tithes in Holford during her life, had it not been for the condition. If in our case the words had come in with a proviso, "provided that my wife shall enjoy my lands in Holford," it might have been more doubtful; for many times such clauses are added for explanation's sake, as upon the statute of 5E. 6. of offices concerning administration of justice, "provided it extends not to a partnership;" and such a clause is a sentence of itself, and not depending upon the other clause. But here the condition being part of the same sentence, and, if it were spoken, drawn out with the same breath, as one entire sentence, makes the case much stronger. Whether the condition be a devise to the wife of the tithes, or only a restraint to John, is not material in our case: but I hold it is both, as was held at the bar; because, unless it be a devise, the words "that she shall enjoy" cannot be supplied. But this is not a rule for all devises in like nature, as a devise to J. S. upon condition he

1 Co. 22. Porter's case.

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shall pay 100*l.* to J. D.; I will not say this is a devise out of the lands in lieu of 100*l.* to J. D., that though the heir enter for the condition broken, he shall have the 100*l.*

Let those cases stand upon their own bottom: in our case it is apparent, (by the restraint in the very same clause, whereby he devised his lands to John,) that John was to be concerned in the tithes of Holford; and that could not be otherwise than by their being devised to him; for otherwise they would have gone to the testator's daughter, whom he expected should be born, if this devise took place. And so the tithes of Holford do by the will pass to John, in the general words of devise of lands. There is one thing more to this point observable in his will: he deviseth *all his fee simple lands wheresoever in England to his brother John;* there is found no other fee simple land, (*e*) but tithes, except the houses which lie in Taunton. Houses are not properly lands but in a larger signification; and the word "wheresoever" hath a strong implication that he conceived he had more than in Taunton only, else, probably, he would have devised *all his lands in Taunton*, not *all his lands wheresoever;* but that more was intended to pass than those in Taunton, and that would be nothing else but tithes; and this, though in itself it be no cogent argument, yet concurring with the testator's expression, in calling his lands in Holford, "Free lands in Holford," makes it a stronger proof that his *tithes in Holford* pass by the devise of all his fee simple lands in Holford.

"Houses are not properly lands," *but in a large signification.*"

I thought it necessary to say thus much in this point, because it was mainly insisted on at the bar, and it is the foundation of the rest. But I shall say no more, but that it was adjudged, according to my opinion in this very case, in B. R. between Sanders and Bish (*f*) 1651, but entered H. 1649. Rot. 75. *et sic requiescat in pace.*

The second thing in our case is, taking it by admittance that the tithes in Holford do pass to John Saunders by this devise of "all his fee simple lands wheresoever," whether the tithes of Combflory, which are not mentioned in the condition, do also pass? And I think they do.

The point, I confess, to me is of some difficulty, and probable reasons may be given on both sides; and, therefore, no wonder if we differ in opinions: but I shall endeavour to establish my opinion, by weighing the grounds and reasons of the contrary opinions.

(*e*) In the manuscript the word printed "land" is *he had.*

(*f*) S. C. 1 Roll. Abr. 613. 8 Vin. 116. tit. Devise (N.) pl. 4. and Sty. 261. 278.

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The sum whereof is this:—

It cannot be denied that by the devise to John of *all his fee simple lands*, the tithes (as I said before) without other expressions, cannot pass, because he had houses devised to satisfy the words of the will, and because tithes and lands in their proper and legal sense are heterogeneous, and one doth not include the other. Secondly, That the tithes of Holford pass as a devise by the will only, by reason of an implication, or inference of his intent, drawn from the subsequent words, "Upon condition that his wife should hold and enjoy his fee lands in Holford after his mother's death." But what reason is there to extending proper words, which imply only his intent as to Holford, to carry also the tithes of Combflory? The law will not allow an implication upon an implication, or an intention drawn out of an intention, but as relations; and they must be *intenta ad unum*.

Where a devise is of *all the fee simple lands of the testator*, and he hath houses in fee simple and tithes—the tithes will not pass.

Tithes and lands are in their proper and legal sense heterogeneous,—one doth not include the other.

The law will not allow an implication upon an implication, or an intention drawn out of an intention, but as relations.

And it was well said by Justice Walmesley in the case of Sheyland *v.* Baker, H. 42 Eliz. now in print in Cro. 3 Rep. fol. 745. "a will shall not be construed by an intent upon an intent; for then it should be *usque in infinitum*;" and it hath been no further urged that, though Holford tithes shall pass by the words of the will, yet it is but a consequence of the second or third hand that the tithes of Combflory shall pass by it. As, first, that by his free lands in Holford the tithes of Holford must pass to his wife. And, secondly, that therefore that they must also pass to John by the words fee simple lands. And, thirdly, that therefore John must also have Combflory tithes by these words. And it must be agreed that it is dangerous to infer things by second or reflexed ratiocinations in wills, and to extend them by second consequences and reductions; for that is to suppose those who make wills (and are presumed to make them *in extremis et inopes consilii*) to have the vigour of their reason about them, and to be able to draw out logical and mediate consequences upon them.

It is dangerous to infer things by secondorreflexed ratiocinations in wills, and to extend them by second consequences; for that is to suppose testators to have the vigour of their reason about them, although they are presumed to be *in extremis* and *inopes consilii*.

But, notwithstanding all this, I think the tithes of Combflory pass by this devise as well as the tithes of Holford; for, first, it is not the condition which gives the tithes of Holford to John, though it is enough to give them to the testator's wife, as I said before: but that which gives the tithes of Holford to John is the former devise of "all his lands," explained by the condition; whereby it appears he intended to comprehend *tithes* within those words "lands." It explains the words, his "fee simple lands" in the devise, but qualifies not the devise itself.

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And the influence of the words of the condition even touching Holford tithes as to John is not to bring Holford to be devised to him by them, but to bring those tithes within the compass of the former devise, as manifesting and expounding his intention by that devise of all his lands wheresoever to John.

Then here the natural and proper conclusion from the devise to John of *all his lands, upon condition that his wife shall enjoy Holford* is not, that therefore he intended that Holford tithes pass by the devise, (though that be true): but that therefore within the words of devise of his "fee simple lands" he intended "tithes" should be comprehended; for by that expression the tithes even of Holford are devised to John, or not at all; and so that the words expounding are made adequate to the words expounded. Indeed I take it to be a necessary and immediate consequence, if any tithes do pass by the devise, *all* his tithes do pass by it; for if tithes pass by the words fee simple lands, then by the devise of "*all* his fee simple lands wheresoever" all his tithes pass. Thirdly, it were incongruous to say that by devising "*all* his fee simple lands" he intended the devise of all his lands, properly so called, and part of his tithes;—for what ground is there to restrain the word "*All?*" *Qui omne dicit, nihil excludit:* and, as I said before, the words "upon condition that my wife hold and enjoy my free land in Holford" devise nothing at all to John, but only shew that the testator intended more by lands than barely lands properly so called, even all his fee simple lands, be it lands or tithes.

And to say that by this construction here is an implication upon an implication, or an intention upon an intention, is a mistake. A devise to his son after his wife's death is explicit to the son, but implicit to the wife; and here it is an explicit devise to the son as to the person and as to the estate: but the words being general are expounded by other words in the devise.

For illustrating this a little, put the case I put before,—A man seised of houses and lands in Oxfordshire, and houses and lands in Hertfordshire, deviseth all his houses and lands in Oxfordshire, and all his lands in Hertfordshire, to his son after his wife's death. Here is an implication that his wife shall have them during her life: but though the word "lands" would carry the houses in Hertfordshire, yet his intent appears otherwise, and the houses in Hertfordshire will not pass. This is not an implication upon an implication, or an intention upon an intention: but his intention *serves to explain* the word "lands" that it shall not extend to the houses in Hertfordshire. So here the words, "upon condition that my wife shall hold and enjoy my free lands in Holford," *explain* his

meaning, that by the words "fee simple lands" be meant *tithes, and what he had in fee simple;* and being thus explained, of itself, it carries the tithes of Combflory, not by an implication, but by an express devise, though by words which needed an explanation.

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That which passeth by implication in words supposeth something to be wanting in the words,—As a devise *to my son after the death of my wife*—there want words,—words that my wife shall have it for her life; and therefore it is supplied by construction of law; *Subintelligitur quod deest.* But in an explanation no words are wanting but those which stand without a *subintelligitur*, and are only explained by somewhat that follows. The same clause here that explains them to reach to Holford tithes, explains them also to reach to Combflory tithes.

That which passeth by implication in words supposeth something to be wanting in the words.

Implications and explanations distinguished.

Another reason why I think all the tithes do pass in this case by the devise of all his fee simple lands to his brother John Saunders, is, for that I take the emphasis rests as much upon the words "fee simple" as the word "lands." If it had been a devise of *all his fee simples to his brother John*, tithes had passed without question; for his estate was a fee simple estate in them as well as in the land. In the will there are several expressions of lands; first, *fee simple* as contradistinguished to *terms for years*, which he had given to his brother by his will. Secondly, *free lands*, which are contradistinguished to *copyholds;* and yet both fee simples, according to their kinds, the one by custom, the other by the common law; and if there had been a surrender of his copyholds in Holford to the use of his will, I think they would have passed by the devise of his fee simple lands.

Semble, that copyholds may pass in a devise of "fee simple lands."

And though the law will not suffer the copyholds in Holford to pass to John, there being no surrender, yet still his will is the same. His intent was, that his wife should have his freehold lands there, not his copyhold: his freehold land there is contradistinguished to his copyhold lands, but not to his fee simple land; and that answers the objection that was made at the bar, why the wife should not have Combflory by the will, as well as John have Holford. The reason is apparent,—Holford lands cannot comprehend Combflory lands: but *lands*, being a general word, may, if the intent of the will be so, comprehend both Holford and Combflory. If in our case he had devised his fee simple lands in Taunton to his brother John, upon condition his wife should enjoy his lands in Holford, neither his tithes or lands in Holford or Combflory would pass to John. But devising generally "all his fee simple lands wheresoever" to his brother John, and by the condition it appearing that he intended some tithes to be comprehended in that devise, *quod ge-*

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neraliter dictum, generaliter intelligendum ; and some tithes are certainly comprehended in them. (I argue this point as admitting the tithes in Holford did pass) I know no warrant to qualify those words "all his fee simple lands," that they shall take in *some* tithes, and exclude *others*. But that since "tithes" are within the devise of "his fee simple lands," *all* his tithes are also comprehended within the devise of "*all* his fee simple lands."

And so, upon the whole matter, I think judgment ought to be given for the defendant who claims under the devise.

And judgment was given for the defendant. Some exceptions were taken to the pleading on the behalf of the defendant: but I, concluding with the defendant, need not take advantage of them.

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Mich. 14 Car. 2. Rot. 1205.

(Escape from the Fleet prison of a prisoner taken in execution by the sheriff; the warden is liable for the debt and costs, although the writ of *capias* was informal.—Upon a general demurrer, no advantage is to be taken for want of form in the recital of the record of the judgment in the *capias*.—Presumption upon such informal recital.

In action for a single sum claimed upon several causes of demand specified in the declaration, the plaintiff may recover for part, and be barred for the residue.

Writ of *habeas corpus* being directed to the Mayor, Aldermen, and Sheriffs of London, and "*eorum cuilibet*" in the usual form, to remove A. B. from the Compter to the Fleet, the return by the sheriffs only is good.)

BRIDGMAN, C. J.

Harg. MSS. No. 56. fol. 123.

Against the declaration (*b*) several exceptions have been taken, that it is not sufficient to maintain the action. The chief, as I conceive, is this,—the writ of *capias ad satisfaciendum*, whereupon James Brown was taken in execution, is to satisfy the

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(*a*) No report of this case appears to have been before printed.

(*b*) In the manuscript the declaration is set forth at great length: but as the Chief Justice has himself embodied the writ upon which the objections, considered in his Lordship's argument, are taken, it seemed unnecessary to print it. The defendant is stated to have demurred generally upon the declaration.

plaintiff of 548*l.* *unde convict. fuit, sicut domino regi constabat de recordo; nec non de* 12*l.* *pro damnis missis et costagiis suis, quæ idem Hugo habuisset occasione dilationis executionis judicii prædicti, prætextu præsentationis cujusdem brevis de errore corrigend. coram Baronibus ejusdem domini Regis de gradu de le coif et aliis justiciariis ejusdem domini Regis, de Communi Banco in camerâ scaccarii dicti domini Regis apud Westm. adjudicat. unde præd. Jacobus similiter convict. fuit, sicut eidem domino Regi similiter constabat de recordo.* Which writ hath these faults in it:—the judgment was affirmed, as appears by the declaration, *per cur. Com. Scacc. domini Regis; et ult. per eandem cur. Cam. Scacc. considerat. fuit,* that the plaintiff should *ulter.* recover 12*l.* &c. *per eandem cur. ib. adjudicat. secund. formam stat.*; and the record appears to be first entered *coram tunc Just. de Comm. Banco, et tunc Baron. Scacc.*, and to be transmitted *per Justic. de Banco et Baron. Scacc. præd.* And the statute 27 Eliz. c. 8. appoints the writs of error to be directed to the Chief Justice of the King's Bench, to cause the record to be brought before the Judges of the Common Bench and Barons of the Exchequer, into the Exchequer Chamber, &c.; which said Judges of the Common Bench, and such Barons of the Exchequer as are of the coif, or six of them at the least, by virtue of that statute have power. So that whereas the judgment, whereupon the *capias* issues, shall be said to be given in *cur. Com. Scacc.*, or *per Justic. de Comm. Banco, et Baron. de Scacc.*: it is here first *coram Baron domini Regis de gradu de le coife*, and not *Baron. de Scacc.*:—2dly, Instead of *Justitiar. de Comm. Banco*, it is said "*aliis Justic. de Comm. Banco*," which hath a double fault. It is "*aliis justic.*," and they may be but one or two, and not all the Judges of the Common Bench; and then it is not a judgment according to the statute; for it must be by "the Judges of the Common Bench, and the Barons of the Exchequer, or six of them at the least." And it doth not appear here that it was before six; "*et aliis*" implies it was not before all the Common Pleas. If there were but two justices in the Common Pleas, and three barons (as in truth at the time of this judgment reserved there were no more,) yet, if they were all at the examination or reversal, it is a good judgment. But then the record must be *coram Justic. et Baron.*: but if all of them were not there, they have no power to give judgment by the stat. of 27 or 31 Eliz. But if there be six in all, of both courts, it is good enough; but the record must so express it: and here *non constat* it was before all; for it is *aliis Justic. de Comm. Banco*, not *Justic.*, or *omnibus Justic. de Comm. Banco.*

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2dly, It is *coram baronibus de gradu de le coife et aliis justic. de Comm. Banco*, which words "*et aliis*" couples all together to be thus:—Before those barons of the coif and others, Justices of the Common Bench. So that no barons are parties to this judgment, but such as are also judges of the Common Bench, as it might be, and heretofore was, the same person was Chief Baron of the Exchequer, and a Judge of the Common Bench. And so it is not before all the barons of the Exchequer.

5 M. 59. Br. Rep. 8. 1 H. 7. 11. Starky.

Irregular placing of words in a writ not fatal after a general demurrer.

3dly, There is a third fault in it; for whereas the statute mentions the justices of the Common Bench, and the barons of the Exchequer, as it ought to be; the barons of the Exchequer are here first mentioned. But this last is but false heraldry, and it is a general demurrer: and if *toflum* be put before *messuagium* in a *præcipe*, or writ of entry, if no exception be taken to the writ, it is good enough, though the order of precedence be not observed.

Irregular placing of words in a *præcipe* or writ of entry not fatal where no exception is taken to the writ.

But the consequence of the objection is this:—If the judgment recited in the *cap. ad satisfaciendum* be not, in intendment of law, the same which was in *Cur. Cam. Scacc.*, then here is an execution without a judgment to warrant it; for there is no such Court as *curia baron. de le coife, et aliis justic. de Com. Banco*, and so no action will lie for the escape. To answer this objection, which hath great weight in it, it hath been said at the bar that the sheriff shall not take advantage of an error in the proceeding according to Dr. Drury's case; and it hath been adjudged that an infant indebted for wares upon an *indeb. assump.* was taken by *cap.*, and escaped; and although this was a void contract by an infant, if he do not confirm it at full age, and upon *non assumpsit* infancy may be given in evidence, yet the sheriff shall not have advantage of it in an action of escape.

8 Co. 142.

M. Ch. 239.

But I am not satisfied with this answer; for I hold, if there be no judgment to warrant this *cap. ad satisfac.* though the defendant be taken upon it, yet he is not legally in execution whereby the sheriff is liable to an escape; for the action is grounded upon record of the judgment. And, therefore, the judgment is recited here, *quod cum recuperasset*; and be the *capias* what it will, if there be no such judgment as is therein recited, he may plead *nul tiel* record. As if an erroneous judgment be, as without an original, and a right *capias* upon it, and the party is in execution, and escape, the sheriff shall take no advantage of the error. But if the judgment be reversed before he plead to the escape, although the *capias* remain of record being returned he may there plead *nul tiel* record.

8 Co. 142. b. 2 Cro. 249. Burton's case. M. 9 Jac. B. R. If judgment be without an original, and a right of *capias* issue on it, and the party is in execution, and escape, the sheriff shall take no advantage of the error. But if the judgment be reversed, otherwise.

But suppose the King's Bench, or Common Bench award a

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Writ of execution from the King's Bench or Common Pleas to a county palatine is utterly void; and if the party be taken upon it, and escape, no action lies against the sheriff. Moor 275. If one is taken in execution on a *cap. ad satisf.* and no judgment is to warrant it, and to escape, no action lies against the sheriff for this escape. 3 Cro. 459. Moor 407. Adderley *v.* Boothly, S. C. as appears by the number of the Roll. Moor. 275. Where the sheriff acts by virtue of a writ from a court, or person who hath a like jurisdiction, the law excuseth him for executing the writ by command of the court, though the execution have no force in law. (*c*)

writ of execution to the county palatine, *ubi breve domini regis non currit*, this is utterly void. And if the party be taken upon it, and escape, no action lies against the sheriff. (*c*) But that is upon another reason. But here, if there be no such judgment for which he was taken in execution, no action shall lie for the escape. As suppose a *capias ad satisfac.* issue to the sheriff out of the King's Bench, and there is no judgment to warrant it, and the party is taken in execution upon it, and escape, no action lies against the sheriff for this escape, and yet no action lies against the sheriff for arresting him, which is very observable; for where the sheriff acts by virtue of a writ from a court, or person, who hath a like power or jurisdiction, the law excuses him for executing the writ by command of the court, though the execution have no force in law.

One reason is, a writ of error lies of error in the judgment, or in *adjudicatione executionis;* and so if a *cap.* be awarded upon a recognizance, admitting that were error it may be reversed: but if the writ of execution be not misawarded, but a *capias* issues without any judgment, or the writ of *capias* which is issued differ from the award, no error lies for it; for there was no error in the judgment, or the award of the court; and, therefore, a writ that is illegal in such case must be void, because it cannot be reversed by error.

4 Co. 15. Omit these in arguing. 10 Co. 76. Moor. 275. acc. 1 Co. 76. 3 Cro. 918.

Vide 4 Co. 15. Sir Rich. Buckley's case. Si home port appeale de murder retornable in Communi Banco, nul action git versus le plaintif car connt. le brief nt. returne devant competent judge, uncore e en nature de loyal suite per brev. de l'appeale et videtur sil le vicomt sur ceo brief attach. le defendant per son corps nul action git versus lui, uncore si le Common Bench teigne plea en appeal est merement void et videtur mihi si viscot. execute caption sur ceo appeal, return la per brief et agárd de Communi Banco action git versus lui. Issint si justice de p. fait ganant de arrest un pur felony que ne eudited (come devoit etre devant le stat. P. et M.) il que fuit arrest ne liable al faux imprisonment car ne fuit coram non judice mes il fuit judge de case.

3 Cro. 466. 38 Eliz. B. R. 27 Eliz. 8. 178.

In a prohibition by Newton and Sharp against Gennett and others, wardens of the company of tallow-chandlers, the defendant sued the plaintiffs as executors of Thrower, late keeper of Ludgate, for a legacy by him devised. The plaintiffs

(*c*) See p. 236, of this Volume.

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alleged in the spiritual court that Thrower was bound in 1000*l.* to save the sheriffs of London harmless from all escapes, and that one Holmes was taken upon a *cap. utlagat.* after judgment in debt, and escaped, and that debt was brought and judgment against the sheriffs for this escape, so that this bond of 1000*l.* was forfeited, and so there was not assets to satisfy that obligation, and thereupon a prohibition was granted. But for that the judgment was 20 Eliz. and the *cap. utlag.* 25 Eliz. and returnable 35 Eliz. upon demurrer, there was a consultation granted, for a *c p. utlag.* ought to be returnable the next term for the mischief which might otherwise befal the prisoner to be always in prison; and though this arresting is excuseable in false imprisonment, yet it is no lawful imprisonment; and as to the benefit or prejudice of a stranger, he shall never be said to be a prisoner, and the gaolers suffering him to go at large is lawful, and the bond not forfeited.

So I am of opinion in our case, if in truth this judgment mentioned in the *capias* be not, in intendment of law, the same with that which is set forth in the declaration to have been so adjudged in *Cam. Scacc.*, that the warden of the Fleet may take advantage of it, and is not liable to an escape.

But yet I conceive that Browne was well in execution upon this *capias* for two reasons:—

1st, Though this *capias* was very rude and informal, yet upon the whole record appearing before us, I conceive it shall be intended, that the judgment for 12*l.* recited in the *capias* is the same judgment which is before recited to have been given in the Exchequer Chamber; and the demurrer being general, no advantage shall be taken for want of form. For, first, *barons de gradu de le coife* must be intended of the barons of the Exchequer; for we know there are no other *barons de gradu de le coife* but those of the Exchequer.

Upon a general demurrer, no advantage to be taken for want of form.

Gradus is only of serjeants, and there are no serjeants of the coif but by writ upon record.

2dly, "*Et aliis justiciariis banco*" may be taken well enough; for if it be read with a punctuation, "*coram baron. et aliis*, (and other persons) *justiciariis de communi Banco*," "before the barons, and others, justices of the Common Pleas;" that is, "and other persons;" for "*aliis*" may be taken substantive, as our fines run, "*coram A. B. et aliis domini Regis fidelibus.*" Then it appears there were the barons of the Exchequer, and there were justices of the Common Pleas; which, if it extend not to all the justices of the Common Pleas, yet, being in the plural, it carries two; and then it may be presumed there were four barons of the Exchequer and two justices of the Common Pleas at the affirmation of the judgment in the Exchequer Chamber.

If it be said, there may be but three barons of the Exche-

quer, and two or three justices of the Common Bench, I answer, by supposition, there may be four barons and two justices, or three barons and three justices of the Common Bench, or all the barons and all the justices of the Common Bench; and there is nothing in the writ or record to contradict it. And the intendment being equal, that is to be presumed which is most for the affirming of the judgment. And the rather here, because by the other part of the declaration, which by the demurrer is confessed, it appears that such a judgment for the sum of 12*l.* against the same person, upon the same former judgment, which is recited in this *capias*, was given *in curiâ Cam. Scacc.*, and by the Justices of the Common Bench, and Barons of the Exchequer. And it is further set forth that that record was transmitted, and is now in the King's Bench; that *super judicio prædicto sic affirmat.* this writ of *capias* did issue; and afterwards, that he was *debito modo commissus prisonæ, et in executione* for the said several sums.

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Where, in considering the record of a judgment of a court, circumstances do not tend to the presumption of one fact more than of another, that shall be presumed which is most for affirming a judgment.

This construction of the words is genuine and proper enough; and if the *capias* had recited the judgment to have been affirmed before three Barons of the Exchequer, *de gradu de le coif*, and three justices of the Common Bench, this, though not formal, and agreeing in words with the record of the judgment, had been good enough, and so it shall be intended here.

Many cases might be put, where in favour and affirmance of judgments the like constructions have been made.

But *posito, sed non concesso*, that this which is recited in the *capias* shall not be intended to be the judgment of the Court of Exchequer Chamber; and so that the prisoner was not in execution for this 12*l.*; yet I conceive clearly that he was in execution for the 548*l.*; for they are several judgments, in several courts, for several sums; and the *capias ad satisfaciend.* is *pro separabilibus damnis prædictis;* and, therefore, the misawarding the process, or other defect as to the one, shall not annul the execution as to the other.

That being agreed, then the case by admittance still is this:—A *capias ad satisfac.* issues against James Brown, for two debts upon two judgments, one of 548*l.*, and the other of 12*l.* He is taken in execution for both; which, as to one of them, *viz.* the 548*l.*, is good in law, but void as to the 12*l.* The sheriff, or warden of the Fleet, suffers him to escape, and the plaintiff brings an action of debt for 560*l.* entirely, being the whole; and the defendant demurs, whereby the plaintiff ought clearly to be barred of 12*l.*, part of the debt of 560*l.* whether he shall be barred of the whole, or that he shall recover for the 548*l.* which he was in execution for? If he ought to recover for that part, then either judgment may be given for so much

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only, and be barred for the residue; or, if judgment for the whole, he may release the residue. And as this cause is, I conceive, though the demand be of 560*l.*, one entire sum, he may recover for part, and be barred for the residue; for it is not like to the cases for one entire contract, but the demand of several sums, grounded upon several debts, and summed and totalled upon in one. As if a man bring an action of debt of 100*l.* *viz.* 10*l.* upon one contract, 10*l.* upon another, &c. *unde actio accrevit* for the whole 100*l.*; he may be barred as to part, and reckon for the residue. That is constant experience upon the statute of 2 E. 6. for not setting out tithes, *unde actio accrevit* for the said 100*l.*; yet he shall recover the parts. In that case, suppose the action had been setting out wheat so much, and for not setting out tithe of rakings, *unde actio accrevit* for the whole 100*l.*; and the defendant had demurred upon the declaration, the plaintiff would have recovered for the wheat, though the law was against him for the rakings; and the value appearing in the declaration, he should recover *pro tanto*, and be barred for the residue; the judgments here are distinct records, and he is committed in execution *pro separabilibus damnis prædictis*, and these are ascertained in the Court; and, therefore, judgment may be given for all, or part, as the case requires, notwithstanding the demand be of one entire sum.

P. 38 Eliz. B. R. Wright's case, and Mayor and Commonalty of Wickham. A fine of 120 acres, reversed for part of them, and the plaintiff barred in the writ of error as to the rest, whereof he had made one feoffment; and yet the writ of error is an entire writ, and grounded upon one entire record, whereas in our case they are two several records, upon which the case is founded.

In Walker's case, 3 Co. 24. it is said by Popham, "rent, when reserved upon a lease for years, shall be apportioned, if in an action of debt the lessor demand *plus quam oportet*; yet upon *nihil debet* the lessor shall be apportioned and assessed by the Jury, and shall be assessed for the residue." The case will be the same upon demurrer, if the certainty appear to the Court who are to judge of an apportionment; but in case of an avowry it may be otherwise. In Moor's Reports, 281. Mich. 3. and 32 Eliz. C. B. Rot. 2912., in Batty and Trevillian's case, a reversion was devised in avowry for the title of the rent. It appeared that the land was held *in capite*, so that the devise was void for a third part, "he shall not have return for any part. But when the quantity of the rent is agreed in pleading, and the variance is only upon part arrear, there, though he avows for more than is arrear, yet he shall have return for that which is arrear." But the case of avowry differs

Vid. 3 Cro. 771. Ewer v. Moyle, 2 Cr. 160. Smith and Malings.

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from an action of debt, the distress cannot be apportioned, though the rent may be apportioned by the Court.

I do conceive in this principal case, there being two judgments, one for 548*l.* in the King's Bench, the other for 12*l.* in the Exchequer Chamber, he might, after the record remitted, have brought two several actions of debt upon these judgments. Suppose in such a case, or in any other case, the plaintiff have two judgments, and two executions, and the defendant, being in execution, escape, he may bring an action upon the escape, and set forth the several judgments *unde actio accrevit, &c.*; and the bar in the one case is not, I conceive, a bar in the other. For though the escape be entire, and but one, yet it is grounded upon several judgments; and as he may bring one action of escape upon the one judgment, and another upon the other judgment, so he may join them together; and still, according to their nature, he may be barred in the one, and reckon in the other; for the ground was several.

Where plaintiff obtains two judgments and two executions, and the defendant being in execution escapes the plaintiff may bring an action upon the escape, and set forth the two judgments; and the bar in the one case is not a bar in the other.

Pasch. 12 Jac. B. R. 2 Cr. 337,—*Audita querela* by Child against Durrant, sets forth a judgment obtained by Durrant against him *in damnis*, damages 14*l.*, costs 5*l.* 10*s.*, and error in the Exchequer Chamber, and judgment affirmed; and 5*l.* 10*s.* assessed for costs for delaying execution; that between the first judgment and the judgment affirmed he released to Child all executions and demands, yet he had sued execution as well for the first damages and costs, as for the costs upon the writ of error. Upon the issue that he had not released, it was found against him for Child, and adjudged, though the execution be entire, yet it is no cause of discharging the whole. And therefore it was that he should be discharged *quoad* the costs and damages in the first judgment, but not *quoad* the second costs. *Vide* South and Griffith's case, Mich. 13 Car. 1. 1 B. R. 1 Cr. 481.

Another objection hath been made upon the *habeas corpus*, whereby James Browne was removed from the Compter to the Fleet; because it was directed *to the mayor and aldermen and the sheriffs of London and eorum cuilibet* as the usual course is; and yet the return is only by the sheriffs, and so not pursuant to the writ.

To this I answer it is true, if a writ of error or other writ issue for removing a record of a judgment before the mayor, aldermen and sheriffs, they cannot return a record of a judgment before the sheriffs alone, 28 H. 6. A writ of error came to remove a record of a judgment *coram Johanne Prisott*, the record was not removed, because the pleas and records are

If a writ of error, or other writ, issue for removing a record of a judgment before the mayor, aldermen, and sheriffs of London, they cannot return a record of a judgment before the sheriffs alone.

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coram Johanne Prisott et sociis suis. So a writ was directed *Thesaurario et Baronibus scaccarii quia in recordo, &c. coram vobis, &c.* and because the pleas were *coram baronibus* only, he was forced to sue a new writ; for that writ would not remove the record, there being none such. But that case, and the like, being upon a writ of error, which is a remedial writ, and the foundation of further proceedings upon it, differs very much from a writ of *habeas corpus*, and a return thereupon; for as it is said in the case of the City of London, it is but a return upon a writ of privilege, whereupon no issue can be joined, nor writ of error lies upon an award in it: but it is only to ascertain the Court of the truth of the matter. It requires not such precise certainty as in pleadings and other proceedings: it is sufficient, if upon the return the party be brought to the Court when he ought to have his privilege, and that the causes of his imprisonment be certified; for the Court have the fruit of the writ by bringing the prisoner before them, whereby he may have his privilege, if there be cause; for all writs of *habeas corpus* in this Court are grounded upon privilege, either as suing or being sued here. And the plaintiffs in those other suits in which he was arrested have no wrong, having liberty to proceed in this Court if he be arrested upon mesne process and in execution; being turned over he is still in execution for the same debt.

All writs of habeas corpus in the Common Pleas are grounded upon privilege, either as suing or being sued there.

But, 2dly, there is another clear answer to be given to this objection:—A writ out of this Court, directed to the mayor, aldermen, and sheriffs for execution of justice, may be executed by any of them. Lord Co. Com. fol. 161. cites King and Hobbs' case, P. 45 Eliz. though a letter of attorney to four or three jointly or severally to arrest a man, two of them may arrest him; because it is *pro bono publico*, and for the execution of justice in our case the restoring his liberty, which the law principally favours.

APPENDIX.

A.

(See p. 21, n. (*b*).)

THOMAS BURGONG *v.* RICHARD SPURLING.

Tr. 7 Car. Rot. 373. B. R.

IN the manuscript the special verdict is stated at length: but the substance is in Cro. Car. 273.

Ceely's Reports. Harg. MSS. No. 111, fol. 160. S. C. Harg. MSS. No. 40. fol. 527. No. 43. fol. 254. S. C. Cro. Car. 273—283. and W. Jones 306.

In the arguments at the bar for the plaintiff, against whom judgment was given, the following cases were cited:—Rosewell *v.* Welch, Hil. 13 Jac. Rot. 854.; Galloway's case, 21 Eliz.; Bunting's case, 4 Co. 29. b.; Orme and Bird, Pasch. 9 Jac. C. B.; Popham's case, Dyer 218. pl. b.; Br. tit. Presentation *al eglise* 52; and Smith and Stapleton's case, Com. fol. 432. b.

The arguments for the defendant are reported in the manuscript as follows:—

"It was said by the counsel for the defendant, and resolved by all (*a*) the Court, that as a copyholder has but one evidence for his estate, *viz.* a copy of the court roll, (from which he derives his name,) so he hath but one means of transferring his said estate, which is by surrendering it into the hands of the lord; and this is perfected by the lord by the admission of the new copyholder. This applies only to the case of passing a right—when the copyholder wishes to transfer his estate to another person,—not to the extinguishment of a right; for then a common law conveyance is sufficient, as a release by one who hath a customary right, to

(*a*) In the report of this case in No. 40. of Mr. Hargrave's Collection, which is short, several of the points in this part of the case are attributed to the Judges, severally, by name,

another who hath possession of the land *hath another purview*, (*b*) which is a customary title in him who is in possession, upon which the release of the said customary right may enure, 4 Co. 25 b. Quinton's case. If copyholder in fee bargains and sells his estate, by deed enrolled, to the lord,—this bargain and sale was adjudged in the case of one Humerstone (as Justice Jones reported) to be good, because it operates by way of extinguishment of the copyhold estate; and the lord assents. But no means exist of transferring this copyhold estate but by surrender, which is after various methods; in court or out of court, into the hands of the lord, of the steward, or of two tenants, in person or by attorney: but none of such surrenders are perfect until admittance; before which, although the right in point of interest is transferred by the surrender, still the possessory right remains in the old copyholder. And for this reason if the surrenderee die before admittance, his heir shall be admitted; for he had jus *ad* rem, although not jus *in* re; and therefore he cannot punish a mesne trespass: but the law gives this action to the old copyholder in whom the possessory right remains until admission; and this not only against any stranger trespassing, but also against the lord himself, if he commit a trespass. And the lord cannot justify it by reason of the surrender; as was adjudged in the case of Calmady and Hall for the manor of Moncton, in Somerset, according to the reports of Richardson, Chief Justice. For although his assent is necessary, and the purchaser must be admitted by him, still all the estate passes from the copyholder, and the lord is but the conduit by which the customary estate passes to the purchaser, no interest being taken from the lord: but his assent only is wanted. From which it follows that the admission by the lord does not vary the surrender.

If a surrender be to the use of A. for life, the lord cannot admit A. in fee, 4 Co. 29. b. Bunting's case.

It also follows that divers acts of the lord amount to an admittance, and actual admittance is not always necessary. If the lord accept rent of the purchaser as of his customary tenant, this act amounts to admittance of him; otherwise, if he accept this rent with other rents of the manor, as was adjudged, Hil. 13 Jac. Rot. 854, in this court between Rosewell and Welsh; for his assent to the said surrender only being necessary, this his act declares it. And this surrender vests no interest in the lord; for the absolute right is transferred to the surrenderee, and the possessory right is continued in the old copyholder. For this reason the lord cannot punish any trespass committed between the surrender and admittance.

(*b*) The words translated by those in italics are not perfectly clear to the Editor.

But when it is *pleaded* that by the surrender a customary right is transferred to the surrenderee, this is meant of a complete surrender, as that in court, or out of court, *in the hands of the lord himself.* Now the surrender to Thomas Hutchinson was made out of court *to the steward*, which ought to be presented at the next court; and before such presentment made nothing passes by this to the surrenderee, neither in point of interest or possession,—no right nor possession; and it is good only as a contingency, *viz.* if it be presented accordingly,—if not, it is void; and *merely void from the beginning*, and not avoided (as hath been objected) by the performance of the condition. Then, when the second surrender is made to the use of William Jackson before the first was avoided, this binds the surrenderor, and all who claim under him. Upon this contingency it is also good, *viz.* if the first be not perfected by presentment at the next court. But if it be presented, then the second surrender becomes void by an after act, and of no effect against Hutchinson. In our case the first surrender not binding the right until presentment which was never made, the second being perfected is valid against Thomas Jackson, and all who claim under him, one of whom the plaintiff here is. And as the surrender never bound the old copyholder from countermanding it, it is but begun, and shall not bind the right till it be perfected by presentment; when the right will be bound, but not the possession, till admittance.

A feoffment is made, and livery and seisin within the view;—this livery is not perfect before entry by the feoffee, nor till then shall it bind the right. Suppose that before the entry of the feoffee the feoffor should make a feoffment to another, and execute this by livery, the second feoffment is good against the feoffor himself, and all who claim under him, the first feoffee only excepted. And it is valid upon this contingency, *viz.* if the first feoffee enter not: but if he enter and execute the first livery, the second feoffment is void.

A man makes a lease for so many years as J. S. shall name; in this case the lessee has no interest in the land until J. S. mentions the number of the years; for perhaps J. S. will never mention them, and then the lessee shall not have the land, wherefore the lessee will be a trespasser if he enter before such naming of the years, Com. fol. 7. a. Fogassa's case. Now suppose that before the naming of the number of years by J. S. the lessor lease the lands to J. D. for twenty years, this lease binds the lessor and all persons claiming under him, the first lessee only excepted; and it shall be valid against him also upon this contingency, *viz.* if J. S. never mentions the years, otherwise not. But if I make a lease for twenty years to A., and on the same day make a lease for the same term to B., this latter lease is simply void; and the second lessee shall not have the land, although the first

lessee surrender or commit a forfeiture within the term, Com. fol. 432. Smith and Stapleton's case. The reason of this difference is, that in the case last cited the first lease *binds the interest of the land*, and not the lessor only, wherefore as the lessor hath not power to contract for the possession and interest of the land, the second lease is absolutely void, and cannot be made good by any after matter. So it is if the first lease be made to begin at a future day, for by this the lessee hath a present interest in the term: but when the lease is made for so many years as J. S. shall name, although the lessor himself is bound, yet the interest is not; for before the years shall be specified, the lessee hath no interest in the land, and when the years are specified, it is called an interest from the beginning by relation. On this account the second lease is not void in its creation: but it is voidable if J. S. specifies the number of years, otherwise not.

If a man grant the next avoidance of the church of Dale to J. S., and afterwards grant the next avoidance of the same church to J. D., this second grant is absolutely void; for the first grantee taking the interest and right, the grantor had no power to contract for this again. But if I covenant and grant with J. S. that if he pay me 10*l.* at Michaelmas he shall have the next avoidance of the church of Dale, in this case, if I before Michaelmas grant this to J. D. this, because the former did not bind the interest, is good upon a contingency, *viz.* if the first grantee do not pay the money at Michaelmas; otherwise not.

If I bargain and sell land to A. and his heirs, and afterwards bargain and sell it to B. and his heirs, if the first bargainee enrol his deed within the six months, the second bargain and sale is void. But if the first be not enrolled, the second is valid, inasmuch as the first does not bind the right.

If I grant a reversion to J. S., this does not bind the right until my tenant be made privy to it, and attorns. Now suppose I grant the same reversion to another person, this second grant is good upon this contingency, *viz.* if the tenant never attorns to the first grantee, or if the second grantee first obtain his attornment.

If a man make a feoffment and a letter of attorney to make livery, this feoffment shall not bind the right, nor by force of this is the estate out of the feoffor before livery; wherefore the feoffor hath power to charge the land by a second act, by feoffment, lease, grant, &c. which case does not differ from ours, except inasmuch as there the letter of attorney is revocable, here this inchoate surrender cannot be countermanded.

If a copyholder in fee surrender to the use of his will, the fee, according to Fitche's case, 4 Co. 26. a., continues in the copyholder, wherefore he hath power to charge it by leases within the custom, or by another surrender.

(*c*) If I acknowledge a fine in the vacation before a Judge, and afterwards, in the same vacation, acknowledge another fine, of the same land, before another Judge, in this case, if the day of acknowledgment be certified, and the second acknowledgment be first certified and recorded, and afterwards the first acknowledgment is recorded, the second shall be avoided by the statute of 27 Eliz. c. 4. by averment of the fraud. But if no day of acknowledgment be certified, the second acknowledgment shall stand. For the right was not bound by the fine until the recording it. Therefore if, previously, the conusor make a feoffment, or lease for years, this feoffment or lease shall be good upon a contingency, *viz.* if the acknowledgment be not recorded; otherwise not.

So in our case, although the surrender be not revocable, yet the right is not bound until presentment at the Court: but the estate in right and possession, and for the purposes of charging the land, (*d*) continues in the old copyholder until presentment. If the presentment be made, the mesne incumbrances of the old copyholder are avoided by relation: but if it be never made, they shall be good against all persons whatever. Therefore, when Jackson surrendered out of Court to the steward, to the use of Hutchinson, and afterwards to the use of William Jackson, if the first had been presented at the next Court, the relation of the presentment would have defeated the second surrender, although William Jackson was admitted: but, as it was not presented, the second surrender is good. For if Thomas Jackson had made but one surrender, *viz.* that to Hutchinson out of Court, and it had not been presented in Court, undoubtedly Thomas Jackson would have his customary estate back; and, consequently, William Jackson, the second surrenderee, by claiming under him.

All the Judges agreeing on the point, judgment was therefore given against the plaintiff.

(*c*) The brevity with which this illustration is stated in Cro. Car. 284. was one inducement to the printing of this more correct and more useful report of the case.

(*d*) This report seems to confirm the doubt of Chief Baron Gilbert, when commenting on this case. The Law of Tenures 281., 4th edit.

B.

(P. 27. n. (*k*).)

REEVE *v.* MULSTON,

Mich. 10 Car. 1. B. R.

The report of this case in No. 4811 of the Harleian manuscript, is replete with interesting illustrations of the subject: but the statement in the text clears the point sufficiently for the purposes of Sir Orlando Bridgman's illustrations.

C.

(P. 50.)

ALFORD'S Case.

Hil. 13 & 14 Car. 2.

arg. MS. No. 55. fol. 74. S. C. 1 Ch. Ca. 4. E. U. 2 Freem. 163. Ld. Ch. Nottingh. MSS. Prolegomena of Equity of Ch. 10 s. 25. (*a*). H.

The 30th of January, the Lord Chief Justice, Lord Chief Baron, *and myself* (*b*), were called as assistants by my Lord Chancellor, to hear a cause formerly heard before the Master of the Rolls.

The case was this in effect. John Alford, seized of the manor of Hamsey, settles it (or so much of it as was now in question) upon himself for life, and after to the use of Frances, his wife, for life, (remainder to his first and other sons, but he died without issue,) remainder to his brother, Sir Edward Alford, for life, remainder to his first son in tail, and so to the second and third and other sons of Sir Edward in tail, with remainders over. And John Alford reserves unto himself a power to make leases for twenty-one years.

Januarii 3, 1648, John Alford, reciting his power, makes a lease to Sir Henry Goring and others for twenty-one years, upon trust to permit him, the said John Alford, during his life, to receive the profits to his own use, and after his death they should permit Frances, his wife, during her life, to receive the profits to her own use; and some other uses (were) therein expressed. And upon further trust that the trustees after the death of Frances, during the residue of the said term

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(*a*) For an account of Lord C. Nottingham's MSS. see Mr. Hargrave's Preface to the "Jurisdiction of the House of Lords," clii. See also Ambler 713; Dickens 232; 2 Eden 58; 3 Ves. 581; 4 Ves. 195; 5 Ves. 853; 10 Ves. 582; and 2 Swanst. 5, 6, 11, 44. Several copies of these valuable manuscripts are extant.

(*b*) Mr. Umfreville notes this and similar expressions in other parts of the MS. as shewing that it is the genuine production of Orlando.

of twenty-one years, should permit such person or persons as the said John Alford should at any time, during his life, by writing by him signed and sealed, or by his last will in writing, to such purpose nominate and appoint; and for want of such nomination and appointment, and after the death of such person or persons so nominated and appointed, the heirs of the said John Alford to take and receive all and singular the rents, issues, and profits of the premises.

And by deed poll of the same date, reciting that by another indenture between, &c., of the same date, he had, by a trust therein, limited and appointed his wife to pay certain rents to such persons as by his last will, &c., he should appoint, and by a like trust in the said indenture expressed he had limited the trustees to permit such person and persons as he should by any writing, &c. or last will, &c., to such purpose nominate and appoint, to take and receive all the rents and profits of the said manor after the death of the said Frances; and during the term granted and limited by the said indenture, the said John Alford, in pursuance of the intent of the said indenture, did by the said indenture nominate and appoint the eldest son of William Alford, (a younger son of his) to have out of the said residue *50l. per annum* during the said term; and his two younger sons to have 60*l.* a-piece; and Sir Edward Alford, his brother, to receive the residue of the said residue of the said rents and profits limited to be paid by the said Frances Alford, and also to take and receive after the death of the said Frances the residue of all and singular the rents and profits of the said manor, during the residue of the said term then to come, to his own use, according to the true intent and meaning of the trust of the said indenture.

John Alford dies the same night, Jan. 3, 1648, leaving two daughters his heirs, Jane Ersfield, and Elizabeth, now married to Bickerstaff.

Sir Edward Alford died intestate, Sept. 1653, leaving John his son and heir.

Jane Ersfield also dies, John Ersfield being her son and heir.

The Lady Alford takes administration of the estate of Sir Edward.

Frances Alford was, by the will of John Alford, made *anno* 1643, (before the lease made by John Alford) made his executrix, and proved the will; and having survived Sir Edward and her daughter, Jane Ersfield, in 1659, makes her will, and Eliz. Bickerstaff, her daughter, executrix.

Sir Henry Goring, and the other trustees, exhibited their bill, setting forth the whole matter, and the several pretensions; and pray an interpleader, and the direction of the Court to whom they shall pay the profits.

The Master of the Rolls—decrees it to Elizabeth Bickerstaff;

and the reasons appear in the decree. 1st, He conceived that by the indenture John Alford had reserved to himself a power to nominate one who should take for life only, and no more; because he limited it after the death of such person so nominated and appointed, to his right heir to receive the profits. And that by the deed poll, though he did appoint Sir Edward to receive the same generally, during the residue of the term, yet it was to be intended for his life, for he nominated not his heirs or executors. And it refers to the other deed, for he mentions that "in pursuance of the intent of the indenture he did limit, &c.;" and the close of the indenture is, "according to the true meaning of the indenture;" and the interest of the term being in others, and he having no power but to limit for life of Sir Edward, it shall go to the surviving heir of John Alford, who is also his executrix, being executrix of the executrix; and he conceived the heirs took (as purchasers, as I apprehend), and in a doubtful case ought to be favoured.

Upon the rehearing we agreed, first, That admitting any thing vested in the heirs of John, be it by a possibility or trust, it survived to Elizabeth; for, though John Ersfield, the son of Jane, was a coheir at the time of the death of Frances, when it was to take effect; yet by the death of John Alford, Jane being then a coheir with Elizabeth, it vested in her and Elizabeth together, be it possibility or interest, whatsoever you will call it, and so survived to Elizabeth.

But, 2dly, we held (and indeed that point, and the grounds whereupon the Master of the Rolls decreed it, were in a manner waived by the counsel,) that the word "heirs" could not vest any estate in the heir (it being a chattel), but such as would result to John Alford himself; and being words of limitation, and no heir in being, and parties *antenati*, they cannot take as heirs. It hath been often adjudged a devise of a term to a man and his heirs, (or heirs males of his body, with remainders over), vested in the first devisee; and in Busby Mansell's (*c*) case, which concerned Sir John Aubrey, it was after solemn argument adjudged in the Exchequer, that one having a term, devised the profits of the land to his wife for so many years as she should live, remainder to his son for life, remainder to the heirs male of the body of his son, that it was adjudged a void remainder; and it was said, if a term be assigned in trust for another, and the heirs males of his body, with remainder over, it vests in his executors.

A devise of a term to a man and his heirs (or heirs males of his body) with remainder over, vests in the first devisee.

And, thirdly, we held that, upon consideration of both the deeds, John Alford left himself a power upon the indenture, to appoint the trust *during the term*, and not only for life of the person appointed; for the first words are, "during the term to receive the profits," and the words "after the death of the person so nominated" are but by

(*c*) Cited in Petty *v.* Goddard, p. 56 above.

implication, and indeed to be understood as the fault of the clerk for "want of appointment," or "after the estate appointed (if appointed but for life) be determined," "then to his right heirs."

And the latter deed, which makes no recital, but supposing a power to limit it during the whole term, and limiting it to Sir Edward during the term, makes it clear, as also his appointing of rents to others during the term.

But, fourthly, admitting he had reserved to himself a special power to limit it but for life, yet the rest of the trust returned back to him in interest, and by virtue thereof he had power to dispose of the trust during the whole term; and, though it was objected that though the residue of the term, after the death of the party nominated, should result back to John Alford, yet that was but as a possibility; as if termor for years grant it for life, there remains to him but a possibility which he cannot grant over; yet it was not regarded, for there is a residue of a trust resulting to him in natural equity. The trustees cannot have it, and it is against no rule of law that he should dispose of it; and admitting he had recited his power, and expressed that he had made the appointment by virtue of his power, the law will draw it out of his general power or interest, *ut res valeat*. See Clere's case, 6 Co. 18.; and Spark's case (*d*), Tr. 43 Eliz. Grant to one for life, remainder to his executors; his administrators shall have it, and therefore it is in his power to dispose it.

(*e*) But the great doubt of the case was this (which was not insisted on at the Rolls) that upon the lease for years, John Alford having limited the trust to himself for life, remainder to his wife for life, he could limit none over; and it was said to be the opinion of the judges, that Manning's case, 8 Co. 95. was not to be enlarged; and therefore a devise of a term to A. for life, remainder to B. for life, remainder to C. for life, they held to be void as to C.; and it shall be so in a trust, if so in a devise.

Devise of a term to A. for life, remainder to B. for life, remainder to C. for life, is good.

But the Chief Baron and myself (the Chief Justice not gainsaying it) held, that such a devise was good: for, as the Chief Baron said, the candles are lighted all at once, and they are all persons *in esse*, and no danger of perpetuities. But whether a devise in such a case to A. for life, remainder to B. for life, remainder to C. for life, remainder to the first son of C. and the heirs males of his body, there being no son *in esse*, we did not touch (though I think that is not good, because there must be an estate vested;) and by the rule of Manning's case, in an executory devise, the last devise must be supposed first; and by that construction the devise to the son not

But whether a devise to A. for life, remainder to B. for life, remainder to C. for life, remainder to the first son of C. and the heirs males of his body, there being no son *in esse*, be good, seems doubtful.

(*d*) This case is in MS. in Harg. MS. No. 12. fol. 313.; and in Cro. Eliz. 666. &c. and many other printed reports.

(*e*) See Fearne, C. R. 402.; and 469. 7th edit.

in esse cannot be vested and lodged, so as to raise up the others upon it.

A trust of a term to A. for life, remainder to B. for life, remainder to C. for life, with other remainders over to persons *in esse*, is clearly good. So in case of a trust, the trust of a term may be limited over to persons not *in esse*.

But in our case, being a trust, we clearly held the trust might be limited, of a term to A. for life, remainder to B. for life, remainder to C. for life, with other remainders over to persons *in esse;* for the trustee cannot have any thing to his own use, and they are to pursue the directions of the trustor, and he may discharge any trust for himself; and I held that, in case of a trust, the trust of the term might be limited over to persons not *in esse;* and frequent practice had been accordingly. And I after asked the Chief Baron's opinion, and he clearly agreed with me in it. And I laid this for a ground, that where it shall not be a perpetuity, if a freehold were limited in use, it shall not be void in the like limitation of a trust of a term; and that such limitations of terms shall not be avoided, but where they tend to create perpetuities. It was said, if a term be granted in trust for A. and the heirs of his body, and after in trust for B. and the heirs of his body, that A. dying without issue, it hath been decreed, his executors or administrators shall have it, and not he in the remainder; for that it shall follow the rule of law in like cases upon a devise. But I think there was but one such case, and I doubt of it; for there is no danger of a perpetuity. A., the *cestui que* trust, might have compelled the trustees to have executed an estate, as it was adjudged in the Hampden's case, who was devisee of a term to him and the heirs of his body, with remainder over. And, therefore, there is no inconvenience; and the trustees may pursue the intention of the trustor, without prejudice in law. See the Hambden's case.

Where it shall not be a perpetuity, if a freehold were limited in use, it shall not be void in the like limitation of a trust of a term; and such limitations of terms shall not be avoided, but where they tend to create perpetuities. If a term be granted in trust for A. and the heirs of his body, and after in trust for B. and the heirs of his body. and A. die, *quære*, whether the term ought to be decreed to the executors or administrators of A.

In the principal case the decree was reversed, and decreed for the Lady Alford, and not for the son who had the freehold; for it appeared to be a term in gross, and nothing appeared of an intention in any of the persons, either John Alford, or Sir Edward Alford, that it should wait upon the freehold.

In this case Maynard said, that about 7 Car. my Lord Coventry adjudged that a devise to A. for life, remainder to B. for life, remainder to C. for life, was good to C.; and the case was said to be between Poody and Barker.

Pollexfen, 31. H.

And a case was cited to be decreed about a year since, by the advice of three judges, between Flower and Aprice, of a trust of a term, with several remainders, to one, two, and other sons; which was agreed to be naught, as tending to a perpetuity. Query the case.

8 *Maii*, 1638, 14 Car. A. possessed of a term, for years, devised it to his wife for eighteen years, and after to B., his eldest son for life, and after to the eldest issue of B. for life, and died; and after the eighteen years B. entered, and was possessed; and after had issue a

son, and after makes a feoffment in fee, and dies. This shall not destroy the son's estate, he being born before the feoffment; and so it was resolved and certified by Jones, Croke, and Barkley; and the Lord Keeper's opinion was accordingly between Cotton and Heath, reported by Rolls.

D.

(P. 70. n. (*b*).)

The foregoing judgment contains an account of the old law upon weights and measures, and may explain some points on the subject which has recently been much considered. The result of the late important inquiries is, that the numerous early statutes will probably be repealed, and more uniform and less fluctuating regulations introduced.

As many learned individuals and public bodies, both in Great Britain and abroad, *differ in opinion* with regard to the proposed new standards, the following references may be acceptable to future inquirers:—

1240. *Narratiuncula*, &c. Cotton. MSS. Julius, D. 2. p. 148.

1758, 1759. Reports of a Committee of the House of Commons, appointed to enquire into the original standards of weights and measures in England. For these reports, which were printed, see also the Report of the Committee of the House of Commons of 1814. And see Dr. Kelly's metrology.

1765. Bill printed upon these Reports, which did not pass.

1779. A proposal for uniformity of weights and measures in Scotland.

1788. Report of the French Commissioners, printed in the Memoirs of the Academy, 1791.

Sir G. S. Evelyn's papers, printed in the Philosophical Transactions, and many other papers in the same collections.

1814. Report from the Committee of the House of Commons, 1814; also reprinted in the Philosophical Magazine, Vol. XLIV. p. 171.

1817. Article on weights and measures, by Dr. Olinthus Gregory, published in the British Review, Vol. IX. p. 159.; and afterwards printed separately.

1819. First Report of the Commissioners appointed by His Majesty to consider the subject of weights and mea

sures. Reprinted in the Philosophical Magazine, Vol. LIV. p. 172.

Second Report of the same Commissioners.

1821. Third Report of the same Commissioners, Philosophical Magazine, Vol. LVII. p. 359.

1821. Report from the Committee of the House of Commons on weights and measures, *ib.* p. 430.

1821. Report upon weights and measures, by John Quincy Adams, Secretary of State of the United States, prepared in obedience to a Resolution of the Senate, of the 3d March 1817.

1822, 1823. Sir George Clerk's bill.

Reports on weights and measures, by a Committee of the Highland Society.

Playfair's Works.

1822. Dr. Keith on the Third Report of the Commissioners,—Edinburgh Philosophical Journal, No. 11. p. 41.

1822. Wallace's Observations on Weights and Measures.

In this last book *objections* to the new bill are shortly stated, and supposed improvements are suggested: but the Commissioners seem to have made the following remark with reference to such more rigorous and scientific changes. After stating that amongst other things "they had obtained from the county reports, lately published by the Board of Agriculture, and from various other sources, a large mass of information respecting the present state of the customary measures employed in different parts of the United Kingdom;" they declare, that, "upon a deliberate consideration of the whole of the system at present existing, they are impressed with a sense of the great difficulty of effecting any radical changes, *to so considerable an extent as might in some respects be desirable;* and they, therefore, wish to proceed with great caution in the suggestions which they will venture to propose."—First Report.

The earliest statute intended to be repealed is intituled, "*Assisa panis et cerevisiæ.*" It is cited in Beckman and Maplesden's case, pp. 63, 64, &c. above as of the year 51 H. 3., or 1266, which is the date attributed to it by late editors, till the parliamentary edition of the Statutes was published. It is now classed with those of uncertain date. Hume states that an assize of bread was fixed in the 35th (*a*) year of Henry III. It is observable that Rastall expresses the date doubt-

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(*a*) The instrument is probably of an earlier origin, See Barrington's notes on the statutes and Matt. Paris, Vol. 1. p. 208. upon the assize of bread, and p. 191. as to a constitution for an uniformity of measures made in 1197. at the instance of the Archbishop of Canterbury.

fully. His words are, "51 H. 3. *as it is commonly taken to be;*" and the old editions of the Statutes are not uniform. Mr. Hawkins seems to have been the first to refer to the Cotton Library *generally* for a manuscript copy of it. Mr. Ruffhead, by some mistake, added the name of the division—"*Claudius, D.* 2."—which erroneous reference the late parliamentary editors have preserved. In the division, *Julius* D. 2. fol. 148. is a copy of a considerable part of the instrument, introduced by a very curious short paper in praise of English Legislation, of which an extract is printed in the following note.

E.

(63. n. (*e*).)

Extract from a paper in the Cotton MSS. Julius D. 2. fol. 148. of about the year 1240; and probably written by a monk of St. Augustine's at Canterbury.

"Quæ voluntate principis, quæ legis habent vigorem, et magnatum totius regni sui consensu ad fidelitatum observandam et certitudinem habendam, ut jura sive leges, monetæ mensuræ pondera et assisæ provisæ sunt et statutæ, *de certis principiis et materiis, antequam acta, trahere debent exordium per quod recuperari possint et quoquo modo deficere vel deperire videantur.*——Similiter monetæ quæ recto pondere proficiuntur, ut denarius qui sterlingus dicitur triginta et duo grana frumenti rubei, rotundi, pleni, de medio spicæ frumenti ponderare debet. Sic et alibi aliæ proficiuntur monetæ.——Et sic patet quod monetæ, mensuræ, et assisæ quæ materiata sunt et artificialia, ad materias et principia super quæ fundantur, et unde proveniunt per artem recurrendo, sunt recuperandæ; *et hæc in regno Angliæ diligenter sunt observanda.*——Monetæ nomen nostra vocatur sterlingus, et optimam habet certitudinem, quæ de recto scilicet numero granorum frumenti quæ ponderare debent ut superius declaratur, perficitur et constituitur, et communis est, et esse debet; unde pondera mensuræ et assisæ et aliæ hujusmodi quæ provisa sunt propter communem utilitatem, secundum ipsam monetam in recto pondere perficiuntur, et de ipsâ, æque ponderata, proveniunt. Pondera vero de ipsa moneta proveniunt quia ipsa æque ponderata certa grana ut supra dicitur, et ipsa grana ipsam monetam. Mensuræ siquidem de ipsa moneta, ponderibus intervenientibus, prove-

niunt; primo enim et ponuntur pondera ut uncia, pondere viginti denariorum, libra pondere duodecim unciarum, sic et alia proficiuntur pondera; ex pondere librarum exponuntur mensuræ, ut galo pondere octo librarum, scilicet frumenti ponderari octo libris, et octo galones proficiunt bussellum, octo busselli quarterium London. Assisæ vero de ipsa moneta proveniunt quam in partes, scilicet obulum, et quadrentem præter minus potentes dividere permittitur; et etiam præter ipsos secundum partem minorem ipsius monetæ scilicet quadrentes proficiuntur, et secundum venditionem bladi, non melioris nec pejoris, sed mediocris constituuntur *assisæ panis, et cerevisiæ* in hunc modum:

Quando quarterium frumenti, &c." as in the early Statute Book.

F.

(Pp. 82, 90, 95, 102, 132, 137.)

The foregoing arguments in the case of Berry *v.* White, Grange *v.* Tiving, and Lyn *v.* Wyn, with respect to leases under powers, establish doctrines which differ from certain opinions stated in recent approved treatises. Some of the authorities relied upon seem to be less accurately reported in print than in manuscripts preserved in the British Museum: a selection has therefore been made from those manuscripts for the purpose of illustrating the text of Sir Orlando Bridgman's judgments.

The rules—

With respect to the *time* at which leases to be granted under powers shall *commence*, appear to depend not only on the wording of the powers, and of the whole instrument creating them, but also on the character of the parties; and sometimes on the situation of the land, as to the actual possession, when the powers were created.

The leases in question are,—1st, such as are to begin, in estate, presently, where no other particular interest exists: or, 2dly, they are concurrent with estates already in being which were granted either before or under the powers, and which are sometimes called leases of the reversion: (*a*) or, 3dly, they are to commence at a future day, where no estate is already out; or they are to be in reversion after particular estates already existing.

(*a*) Concurrent leases have also been comprehended under the term "in reversion," Winter and Loveday, Comyn. Rep. 39., and Lyn *v.* Wyn, in this vol.

Of these it is conceived that the first class only can be granted for the whole specified term, where a *general* power (*b*) was created by a settlor in the actual occupation of the land. But the second class is valid, (*c*) if the settlor was a reversioner at the time of creating a merely general power, when the donee of it may make a *concurrent* lease. This class may also be authorised by powers specially worded, or by powers aided by other circumstances not reaching to leases strictly speaking *in* reversion.

As to the third class:—In order to authorise a lease, which is to commence at some future time, or which is to be made in reversion, strictly so called, and is to continue for the whole term specified in the authority, it is necessary that the power, or instrument generally, be so expressed, or that the character or circumstances of the parties and property be such, as to imply an *intention* in the settlors to confer a discretion on the donee of the power. (*d*) Leases of this third class will not be supported under mere *general* words, although used by a reversioner; (*e*) and as to them, it appears to be immaterial whether the lands at the date of the instrument creating the power were out of the actual possession of the settlor or not. In other words, actual possession of the land being or not being in the settlor, affects the validity of *concurrent* leases only. Where part of the term specified in the instrument conferring a general power, has been granted by the donees, and the *words extend to more leases than one*, it does not require any special phrases to authorise the execution of the power for the residue of such specified term to begin at the end of the years already out; and where the duration of the lease, or leases to be executed under the power, falls within the years authorised by it, the interest created by such execution may take effect at a future day.

Shaw *v.* Summers, 3 Moore 196. seems to be one of the simplest cases of general powers: it was for the donees to let the lands "for such *time and term* not exceeding twenty-one years, *as they should think proper*," under which one lease being granted for ten years pursuant to it, another for eleven years, to begin at the expiration of the former, was adjudged to be void. A slight variation of the words "*time and term*" from the singular to the plural number, as the word "estates" is used in the statute of 1 Eliz. c. 19. s. 5., would, it is conceived, have authorised the residue of the number of years specified in the

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(*b*) Leper *v.* Wroth, Cro. Eliz. 5. 1 Leon. 35. 3 Leon. 131. 4 Leon. 65. Shecomb *v.* Hawkins, Cro. Jac. 318. (on which report see remarks below,) 1 Brownl. 148. Yelverton 222. and Shaw *v.* Summers, 3 Moore 196.

(*c*) Webster's case, Lansdowne MSS. No. 1060, fol. 106. b. and below, p. 594. Fox and Collier's case, Moor, &c. and below, p. 596. Read and Nash, 1 Leon. 147., and S. C. below from manuscript reports, p. 607.

(*d*) Whitlock's case, 8 Rep. p. 138.

(*e*) As in Shecomb *v.* Hawkins, Cro. Jac. 318. Bridgman, C. J. in Berry *v.* White, in this volume, p. 96.

power to have been granted in reversion. This is the doctrine of Periam, J. in Fox and Collier under that statute, as extracted in page 603, &c. from a manuscript report; and it seems to have been approved by the whole Court in a subsequent case. Sound construction according to the plain meaning of general words, and to the rule that chattel leases may begin subsequently to the execution of them, seems to justify this doctrine. But, as the power in Shaw and Summers stands, the decision there appears to be right upon the same principle. In Lyn *v.* Wyn, p. 141 of this volume, the validity of a lease for an abridged term of years, to begin at a future day, is noticed from early cases by Sir Orlando Bridgman.

Upon concurrent leases the *dicta* in Webster's case, Lansdowne MSS. 1060, fol. 106, b. are remarkable. It was there moved if a lease for twenty-one years in reversion made by a bishop were good, or not by the statute of 1 Eliz., and from what time they should be good. Bendilowes said "it is a common case; and such leases are good for twenty-one years after the time begins, and not only for twenty-one years after the making of the lease; for the words of the statute are, that they shall be good for twenty-one years after the time at which the lease begins."

Dier, C. J. said "the words are *from the time that any* SUCH LEASE *or* GRANT *shall begin;* so that the statute refers only to the time of the *making* of the instrument of lease, grant, or other assurance, and not the time when the *term begins;* and the doubt arises on the ambiguity of the phrase, "from the beginning of the lease," inasmuch as it may be referred to the *making of the writing*, or to the *beginning of the term.* It must be explained by the two words following, of the *grant*, or *assurance*, which is to be understood from the *delivery of the grant or assurance*, for every grant or assurance is agreed to be a grant or assurance by the sealing and delivery of it, and so a lease to commence at a day to come is a lease grantable or forfeitable now by the delivery. See the statute of 13 Eliz. c. 10. of leases by spiritual persons, where the words are such as to remove all doubt in construction that other leases than for twenty-one years from the time of making or granting the lease or grant are void. And so Dier held that leases in reversion, made to begin at a future day, are not warranted by the aforesaid statute: but if the second lease be directed to begin immediately, although it be not to take effect immediately on account of the former lease being in existence for some years, this sort of lease in reversion, like leases in possession, is good notwithstanding this statute for the residue of the twenty-one years, the years being reckoned from the making of the second lease. And to this purpose was the opinion in Easter Term, 15 Eliz. where the case was that a bishop in the time of H. 8. lease parcel of his episcopal lands for

years, which lease was confirmed by the Dean and Chapter. And after this statute of the 1 Eliz. had passed, the successor bishop join the dean and chapter under their common seal in a lease for three lives, certain years of the old lease being unexpired, their attorney having authority by the same deed to expel the termor and give livery; whether this lease for three lives were good notwithstanding the statute was the question. Mounson and Manwood, then Justices, thought it good, because between the parties it began forthwith by the livery, it being understood that the first lessor should not be prejudiced of his term by that; and Mounson, Justice, said that he knew in practice where a bishop leased for twenty-one years, and when ten of those years had expired, he leased the land to another for twenty-one years, to begin forthwith; and that the second lease was held good, inasmuch as the church was not dispossessed thereby more than twenty-one years, which seemed to him to be the intention of the permission of the statute; for the second term begins immediately, and the years of it run during the former term. So that when the first lessee had enjoyed the first eleven years left of his term, then there would remain but ten years of the second."

Note by manuscript reporter, in this Lansdowne MS. See the statute of the 18 Eliz. c. 10. Note, that according to the dicta of Dier, Mounson, and Manwood, it was adjudged in the Exchequer Chamber by all the Justices between Scott and others, that where a bishop after the statute of the 1 Eliz. made a lease for twenty-one years, there being a former lease in being for four years, that this lease should be good for seventeen years." See the case in the same manuscript, fol. 47. 25 Eliz.

It is remarkable that in this report the Chief Justice Dier appears to reason upon very different principles from those attributed to him in Fox and Collier; and the decision in the latter case is *sometimes* (*f*) *treated with disrespect*, upon *his Lordship's* authority, but apparently without good reason. The distinction between *concurrent* leases, and leases to *begin* at a future day, or reversionary leases, was early adhered to with reference to the statute of 1 Eliz. c. 19. Marshall's case was decided probably before Fox and Colliers; and there a second lease made by the Archbishop of Canterbury, to *begin* at the *expiration* of a former lease, was held bad; and in a subsequent argument Popham especially distinguishes it in this point from Fox and Collier. It will be seen that in the latter case the argument was on the construction of the statute rather than on the *illegality of concurrent leases;* which, independently of the statute, and under *ordinary* powers, seem to have been taken to be good.

The Marquis of Northampton's case is sometimes cited as a direct

(*f*) See the authorities collected to that purpose by Mr. Sugden on Powers 595; and Harg. Co. Litt. 45. a. n. (1).

authority for the granting of leases in reversion under a general power: but it seems probable that the case was decided on special circumstances. Within eight years after the judgment it is mentioned, in 3 Leon. 132., with more apparent accuracy as to the point on the general doctrine than the other reports exhibit; and 3 Leo. 132. is similar to a manuscript in the British Museum, where Clench, J. is stated to have cited the case "of the Lord Marquis of, &c. who had power by a statute to make leases, and there was an old lease in being not made by him, or by force of the statute; and he made another *to begin after the end* of the former; and it was doubted whether it were a good lease or not, because he had not made any lease before: but if both had been made by force of the statute,—all held that the latter had been void."

This obviously is the case of the Marquis of Northampton, which may justly be said to have depended on special circumstances. If considered with reference to the statute of 32 H. 8. c. 28., as suggested in Bacon's Abridgment, it cannot be classed with cases under *general* powers; and then it is not in point upon the present discussion. If the division of the Court, and the remarks of the early commentator be regarded as important, it will scarcely be an authority against the general principle, even in similar special circumstances. It is submitted that the suggestion in Bacon's Abridgment from Dyer is sound that "the *intent* of the act seemed the rather to warrant the lease in reversion, *because there was no restraint from making leases in reversion, as there is in* 32 *H.* 8. *c.* 28. which seems *implicitly* to give a power of leasing them in reversion." On no other ground than this implication does the case appear consistent with the principles recognized by the contemporary judges. And see as to this case, p. 604, 5, below.

Fox v. Collier. The case of Fox and Collier is in 1 Anderson 65. and Moor 107., and several reports of it are also preserved amongst the Lansdowne and Harleian Manuscripts. The following arguments are translated from the respective collections in the British Museum.

(g) "Under the stat. of 1 Eliz. a bishop leased for twenty-one years, according to the statute; and within four years of the end of it he makes another lease by indenture for twenty-one years; if the latter lease is warranted by the statute is the question. Windham and Periam hold the lease to be good; Dyer and Meade contra. And Periam divided the statute into four branches:—1st, what things are parcel of the possession of the bishop; and, 2d, what estate passes; 3d, the manner of lease that shall be for twenty-one years or three lives; 4th, that the ancient rent must be reserved. (For the 1st, &c. For the 2d, he puts divers cases out of Stapleton's case, Plowd. If

(g) Lansdown MSS. 1104. fol. 32, b. 24 Eliz. Fox and Collier.

lease be made for thirty years, and then the same land is let to another for forty years, this is a good lease for ten years. And here an estate for seventeen years passes, which is within the statute; for it passes now and is good by estoppel; for by the indenture, a lease by estoppel by circumstances may be within the statute: as if a bishop leased for twenty-one years, and afterwards leased to another for ten years by indenture,—if the first lessee surrender his term, and second lessee enter, this is within the statute.")

" (*h*) The Lord Dyer argued, that such an estate ought to pass as was an estate in actual possession, and not in expectation; and he made a difference between an estate and an interest. If a lease be made to one of land during a lease which another had of the same land, and the second lessee is impleaded, he shall not say *possessionatus de statu termini*—it is not an estate without possession: but he shall say that he was possessed *de interesse termini*; and that is before the possession. And the words of the statute are, that an estate of the land ought to pass: but in the case no estate did pass, but an *interesse termini* only, therefore it is not within the statute. And Meade, J. said that a lease in expectancy was not within the statute, because the statute was for the benefit of the king and crown, and of the successor bishops: but if leases in reversion could be within the statute, then a bishop might make a lease for twenty-one years, and afterwards another for twenty-one years to begin after the end of the former; and so the successors would be prejudiced, and likewise the king in time of vacation of the see would receive no profits; wherefore no lease is good under the statute if not in possession."

Periam's judgment is better reported in another manuscript, see p. 603.

" (*i*) Dyer said that every bishop at his consecration is sworn to three points:—1. *quod sit Deo devotus*;—2. *successori et ecclesiæ*;—3. *utilis et fidelis regno*. And in making such leases he impugns all three points, because on a lease in reversion he cannot have any rent; for if he enter on the land, and the first lessee oust him, it is a good plea in an action for the rent to say, that having before an earlier lease, he entered and was possessed of the land. Mead held that lease for life, remainder for life, should not be within the statute, although it would be in effect but for three lives; for if so, the first lessee would be dispunishable of waste, which was not the intent of the statute. Dyer said that a lease for forty years, if three lives should so long remain, was not within the statute; for it is not a freehold, but a lease for years beyond twenty-one years.

And afterwards Popham argued in the Exchequer Chamber, that the lease should be void by the statute; for the mischief before the statute was, that by the long leases of former bishops their successors had only small revenues to support themselves; and so by continuance the clergy

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(*h*) Lansdown MSS. 1072. fol. 283. Archbishop of York's or Grindall's case.

(*i*) Lansdown MSS. 1104. 32. b.

should be of no ability nor reputation: but still the leases should not be void against the bishops who made them, but against the successors, as a lease on maintenance is not void between the parties.—And he said three things were necessary in every bishop's lease:—1. It ought to be a lease in possession. 2. It ought to be a lease beginning by limitation in the time of the maker of it. 3. The ancient rent should be reserved. For the first he said, if a bishop be bound to make a lease for three lives, or twenty-one years, if he grant the reversion depending on an estate for years, he would forfeit the obligation, and it would be a lease in reversion. Three mischiefs attend this:—1st, The successor will not have his annual rent; for if the first lessee attorn, the second lease will enure as a grant of the reversion, and he shall have the rent. 2dly, The first lessee cannot be punished for waste, if he can grant the reversion for three lives. 3dly, When the lessee has notice that another has the reversion of his term, he will pay no regard to cultivating the land. The second point is, that the lease ought to be by limitation within the episcopacy of the maker of it; and to this point it was determined, 21 Eliz. B. R., that if a bishop leased for twenty-one years, and afterwards, four years within the end of that term, he leased to another for twenty-one years, that is void: but lease for life, to begin at a futnre day, may be within the statute; for that begins not until livery be made. And for that, if a lease for life be made to begin four years after, that is a good lease; and if a lease for years be made on condition to have the land for life, until the condition be performed, he shall have it but for years: but in our case the lease was to begin from the date, and therefore is void. Thirdly, the ancient rent ought to be paid; and here no rent will be paid, for no interest in possession passes until the first lessee attorn: but if he reserve more than the ancient rent, that is good; for the greater comprehends the less. But if it be made paying every three years the ancient rent, that is not good; for it ought to be paid every year; although as much be paid at the end of the three years, that is not enough; a lease reserving provision for housekeeping is not good by the statute.

"Boys *contrà;*—He shewed what liberty bishops had by the common law; 2 H. 4. 11. "If a bishop make a lease for life, their successors should not avoid this by entry, unless made in *person;* and by this statute he may grant fees to execute an *office;* for the statute is as well for the benefit of the Queen in time of vacancy, as for the successor; and the Queen cannot be an officer, and officers are necessary as in 8 H. 7."

"Feoffees in trust may grant a fee for advice to defend their title of the land by the assent of the *cestuique trust* (*j*); but to grant *the advowson* (*k*) is restrained by the statute; for that is advantageous to the

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(*j*) The words in *italics* are substituted for a contraction, by conjecture.

(*k*) The contraction for which the words in *italics* are substituted, is very obscure to the editor.

bishop for the advancement of learned men. But it seems that the grant of the nomination of the clerk is not restrained; for still he remains parson. *It has been objected* not to be good by the statute, *because it is to begin the day after;* but in the second case it begins on the same day, and here it is made to begin from the time of the date; so that although it does not begin immediately as to possession, still it begins to some purpose, as to be perfect by entry, and an *interesse dimissionis* passes; and if a lease be made in the morning to begin from the setting of the sun, it is a lease to begin now; for the day is not divisible. And if a lease for years, to hold for life on condition, that is void by the statute, because it begins not to be a lease for life on the sealing of the deed; but a lease for ten years, and so from twenty years to ten years, is good by the statute. A lease made by a bishop out of possession is good, and within the meaning of the statute, although it may be for trial of title."

"It is objected that this is a lease in reversion, and that distress cannot be made for rent: but notwithstanding this the lease is good; for after the first term he would not have debt for all arrears *in like manner if the lessee had no such lease* (*l*), still he will have the rent by way of estoppel, and in like manner his first rent, which is very convenient if the lessee does not aid him by pleading. Although this be not a lease for twenty-one years, still it is one for seventeen years, and *omne majus in se continet minus.* 18 E. 3."

"Walmsley, *contrà.* At the common law the lease of a bishop was not void: but by acceptance the successor might make it good. But if he accepted the rent, it was void by his death. And against this mischief the statute of 21 H. 8. was made that a bishop might let lands for twenty-one years; and because all mischiefs were not stayed by this statute, therefore the statute of 1 Eliz. was made, which first restrains all the power of the bishop, and then the saving authorised him to make leases for twenty-one years, &c. And in our case a right only passes, and not an estate; for Littleton saith, if a joint-tenant leaseth to begin at a future day—that is a right, and not an estate before he has actual possession; so that it ought to be a lease at the time of the making; and on this point, if a bishop make a lease on condition that the lessee shall obtain the consent of the Dean and Chapter, this is a void lease. So if lease and livery on condition, and afterwards the condition is performed, the lease is void; and if a lease be made for ten years, on condition to hold for forty years, the condition overthrows all the lease, because by the condition he had a possibility to have it more than twenty-one years. If lease be made for two years, on condition to have the land for three lives, this is all void. But if a bishop make a lease for lives, and then makes a letter of attorney to make livery, this is a good lease because it begins not before the livery,

(*l*) The manuscript is obscure in the words in *italics.*

as, 9 Eliz. an abbot in Ireland had made a lease in possession, and after made another lease, and then he made a lease to another, *terminis prædictis finitis*, to have the land from the time of the making: and the doubt was, how these words should be construed. And by the Court:—it shall be construed a lease in possession, *finitis dictis terminis;* and in the mean time it shall only be an *interesse terminis.* And he argued that this lease ought to be construed according to the intent of the statute; and the statute was made for the advantage of the successor, and therefore ought to be favourably taken for him: for *lex in ejus bonum maxime construitur in cujus beneficium efficitur*, as West. 2. extends to *all issue of the issue*, although the statute speaks only of the *issue of the donee;* and here if a lease in reversion be legal, he may make a lease for three years, and then another lease for another three years to another, and so beyond, until twenty-one years are complete: and so there will ensue a multitude of actions, which is inconvenient, inasmuch as the successor cannot recover the place wasted in an action of waste, for by shortness of time the lease shall expire pending the writ."

"And when a statute directs an express form of leases, that ought to be observed. And here rent is not reserved, for this new estate shall not pay any rent; and so is 1 E. 6. Br.; and 9 Eliz. it was adjudged in C. B. if a bishop let land in possession, and in possession and reversion, and tenants shall go out of the land in possession."

"Gawdy, *contrà;* for a lease by estoppel for twenty-one years is good by the statute; and it is not here material that no distress lies for the rent during the first term; for if he leased tithes, or fines of his courts there, no distress could be had, still the lease is good. So if the lessee does not occupy the land during his term, or assign it, and another enters, the distress is gone; still the lease is good. But he may have debt for the rent in this case, and have the body of the lessee in execution: but if no rent at all be to be paid, still the lessor is not prejudiced, for he will have rent from the first lessee; and by conclusion between the parties this is a lease for twenty-one years, but in *rei veritate* it is a lease but for seventeen years: and a lease for three years, and so for three years, until twenty-one years expire, is good within the statute. And if a bishop make a lease for ten years by a deed, and by another deed lease for eleven years, and deliver them at the same time to the same party, this is good within the statute; for it is but for twenty-one years, if the reversion on a lease for five years be granted to a bishop, and the lessee surrender on condition; and the bishop lease for twenty-one years to J. S., and the condition is broken, and the first lessee enter, still the second lessee shall have a lease for sixteen years. So if a bishop enter on lessee for four years, and make a lease for twenty-one years, and the lessee re-enter, the

second lessee shall hold for seventeen years. If a lease be made for five years on condition to hold for sixteen years, this is good within the statute, inasmuch as it is a greater advantage to have this lease to be good."

" It is objected, that by several leases more actions may arise: so may they on one lease, if the rent be every year unpaid."

" As to the case of the Archbishop of C. who made a lease for twenty-one years, *to begin after the end of the former lease* for twenty-one years, and which was afterwards adjudged void: indeed, I agree to it, for it was a lease for more than twenty-one years, for it was a lease for all the years; but that is not so here."

" Rhodes *contrà*. At the common law a bishop might make leases for as many years as he would, with the confirmation of the Dean and Chapter; and by matter of record he might bind his successor without the assent of the Dean and Chapter; as 7 E. 4. 12. in *quo warranto* for franchises, he confesses he had no title. 7 R. 2. 7. if abbot in annuity confess the annuity, that shall bind his successor. So if he made an obligation in his own name and in that of the convent, and in debt confess the action and die, the successor shall not stay execution. So it is of a bishop; and the statute of 32 H. 8. enables him to make leases for twenty-one years, or three lives, without the confirmation of the Dean and Chapter; but with their consent he may make leases for 100 years: and until the statute of 1 Eliz., if a bishop enfranchised a vill, that would not bind his successor; but although a bishop be deprived, still his lease shall remain good. Also, if he make a deed before consecration, and if a bishop make a lease for so many years as J. S. shall name, that is not good, although he name but twenty-one years, inasmuch as he might name more; and the statute is, " whereby any estate doth or *may* pass." And he said that 6 Eliz. in C. B. it was argued and determined that the rent reserved between the lessor and lessee shall be called the ancient rent, and here the rent that is reserved afterwards by the lessee to other lessees."

(*m*) " Snagg, Serj. said, the statute consisted of restraint and exceptions. The restraint was, that all grants, leases, and deeds, by bishops should be void:—then comes the exception—" Except leases, &c." and it is not a law which *gives* any thing to the bishops, but leaves them at liberty to make leases for twenty-one years, as they could do before the statute. And he put this on the following proof. When a statute gives a thing, and afterward an exception of other things come in the same statute, this exception makes the thing of the same nature as if it had never been comprised in the statute, and as if it had never been included in the gift. So here the statute forbids bishops

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(*m*) Lansdowne MSS. 1072. fol. 72. or 301.

to do any act. Then comes the exception, "leases for twenty-one years, or three lives." This is not a gift to them by the statute: but the exception places them as they were before the statute; and before the statute they might have made leases for twenty-one years, or forty years, or more, before the end of a former lease; and the same power they have, notwithstanding the act of 1 Eliz. And to prove this construction to be good, he compared the statute to other statutes; as to *Magna Charta*, c. 34. *nullus capiatur vel imprisonetur propter appellam feminæ de morte alterius quam viri sui, Ceo statute est* a restraining law; for, before, a wife might have an appeal of the death of her *ancestor*. If she be heir to her husband, then the exception operates to permit her appeal *de morte viri sui*: but the *statute* does not give it, but she has it at the common law, and by the exception it is left to her. There is a statute of 8 H. 7. of liveries and retainers, "that no one shall give a livery or badge, or retain any person other than his menial servant, &c." there is a restraint, and then comes an exception, other than his menial servants, &c. which he might do at common law; and by the exception the statute leaves it as it was before; and he cited several other statutes to this purpose, and said, that by the common law the force of a proviso or exception is that the things excepted should be understood as not included within the grant; and for this position he quoted Bracton, who says, *si manerium tibi do, retenta mihi una parcella, ista parcella exempta manet quia fuit donata.*"

"After this case had been argued in the Exchequer Chamber, before all the judges; and there Clinch, then third Baron of the Exchequer, Periam, puisne Judge of C. B., Windham, third Judge of C. B., Chute, second Baron of the Exchequer, and Ayliffe, puisne Judge of B. R., were all of opinion that the lease was good, for the reasons given by the serjeants at the bar; then the case was no more argued by any others of the judges, but it was decided that the lease was good, and judgment was given accordingly, in Tr. T. 25 Eliz. in C. B. But it was adjudged that the lessee of the bishop should keep possession till Michaelmas, in order that the corn might be harvested; and he might take other crops from the land, which had arisen from his own industry."

The following note of the case is taken from the Harleian Manuscripts in the British Museum, No. 1588, eleven pages from the end of the volume.

Clench, Baron, states the case to be argued in the Exchequer Chamber, in substance as in the printed reports.

Periam, puisne Justice, C. B. said that the lease was good; "first, it seems to me that this case is within the words of the statute of 1 Eliz.; and if not within the words, it is within the intent. The words are,

" all leases, &c." (the first part of the argument is to prove, that " the lease was within the letter and intent of the first part of the statute, *scil.* that the land was part of the possession of the church at the time of the lease made." The argument then proceeds). The second part of the statute is, " whereby any estate may or shall pass ;" and it seems to me that it is within these words. For an estate here passes for twenty-one years : and although it be objected on the other side, that this estate here is only by estoppel, and that it is not the intent of the statute to have such an estate ; yet it seems to me that this estate by estoppel is good, for no mischief can arise to any one : for the lessor knows what he lets, and the lessee what he hires; and the successor, perhaps, will receive some advantage by it, for he will have two rents, one from the old lessee, the other from the new lessee by estoppel. And as to what has been said, that the rent ought to be such for which distress may be taken, that is not so ; for rent reserved of such things, out of which *no distress* can be taken, is good enough, and within the intention of the statute : as if bishop lease tithes, a market, or a fair, in which things distress cannot be taken for rent reserved upon such lease, still this lease is good enough ; for there is remedy in the cases for the rent by action of debt, which the law adjudged the best remedy ; for the law always adjudges the person better to be charged than the land. But in our case he might have an action of debt for the rent against the lessee, or distress him for all his arrears when he has possession of the land."

" But the greater matter in this case is, if this is a good lease within this statute : for they deny that it can take effect now, but is in truth only a lease for seventeen or eighteen years, and then not within the letter of the statute ; for the statute is, " other than for *twenty-one* years," &c. But it seems to me as to this to be good enough, as it is within the intent, that, when the statute gives to them authority to make leases for twenty-one years, that this gives them authority to make leases *under* that number. As if I cannot alien any land except my manor of D., in this is included that I can alien any *parcel* of my manor of D. *Quia omne majus in se continet minus.* As the statute of 23 H. 6. prohibits any sheriff to let his county to farm, in that is included also that he shall not alien any parcel of it, as was held in 21 H. 7."

" And as to what has been objected, that this lease cannot be good, because there is an old lease in being, which is to last longer than one year ; and for that the latter lease shall be void, and to this intent this statute shall be referred to the meaning of the makers of the statute of 32 H. 8., by which it is provided that no new lease shall be good, where there is an old lease in being, which is not to expire within a year, &c. But it seems to me that this shall not be so, for implication is not to be collected in an exception. For an exception must

include all things specially, which they intend to have saved from the generality of the statute, and they in this explain themselves: wherefore (implication or) intendment shall not be taken upon (implication or) intendment. And if intendment shall be taken, it shall be beneficial finally for the parties excepted, as it is to be expounded in favour of the bishops for whom the statute was made."

"Also, as this case is, they shall not be intended to have any such meaning; for, where makers of statutes recite part of a statute made before, and make this to be parcel of their statute, and add more matter to it; but relinquish some of the mischiefs which were provided for, and remedied by the latter statute, and the subject relates to uses in the new statute; it shall be intended that their meaning was not to redress that mischief: for it shall be intended that they thought well of the former statute, and consider the mischiefs that were remedied in it, but did not intend to remedy them by their own statute; and for that point, by the same statute, *scil.* the statute of 32 H. 8, power was given to the bishops to make lease for three lives of lands which they held in right of their sees. And by the same statute they cannot lease to one for life, remainder to another for life, remainder to a third for life: but by this statute I understand that lease made to one for life, remainder to another for life, remainder to a third for life, is good enough. So where, under the statute of 32 H. 8. lease for years or life, without impeachment of waste, is void, still under this statute it is good; for when a statute remarks a mischief, and does not remedy it, it shall be intended that the legislature mean to omit it. And as to the latter part of this statute, it is good enough by the reservation of the rent, as here it is averred that the ancient rent is reserved; and by intendment it is to be taken that this rent must be such rent as had been paid within the last twenty years, and cannot be charged; and for this, where before this time corn had been paid for the rent, he cannot reserve money for the rent, but it must be reserved as before. But as to the circumstance that it used to be paid annually, that is not material: as if it had before been used to lease for years, reserving each second year a rent, such reservation is now good enough. So I intend upon each branch of the statute, that each lease made by the bishop is good, if they exceed not twenty-one years, or three lives. And for that a lease made by a bishop for ten years, and in the same day he makes a lease to another for eleven years, to begin after the first lease, both these leases are good enough, for both are only twenty-one years; and the case objected, which was in C. P. between Glasscock and Brandon, is not very material. For the case there was, that the Marquis of Northampton being divorced from his wife, a statute was passed, "That all leases made by him of his wife's tenements should be good, if they exceeded not twenty-one years." And he

made a lease for twenty-one years, and after made another lease for twenty-one years, to *begin after* the first lease, this latter lease was adjudged to be void, inasmuch as the statute did not enable him to make leases except for twenty-one years; and this is in fact as a lease for forty-two years. But this statute here enables bishops to make leases, so as they exceed not twenty-one years from the day of the date; and as to this, by this statute bishops cannot make lease to begin from Michaelmas next ensuing, for twenty-one years, for that is more than twenty-one years from the day of the date of it. But in our case it is but a lease for twenty-one years, from the day of the date; and for that there are several cases. But I will put a case which no one will deny, *viz.*—If a bishop make a lease for five years, and besides his right over this immediate lessee makes a new lease to another for twenty-one years; the first lessee enters, still this latter lease is good for the residue after the first years determined. The same law if the first lessee had surrendered on condition to the bishop, and he made a new lease for twenty-one years, to another for twenty-one years; and if the first lessee enter for the condition broken, still the latter lease is good."

"And these cases are all one with our case, in reversion; so far from saying that it shall be mischievous, it seems to me that there is no mischief in it at all, for it is as good for a bishop *as for another*. And if it should be otherwise, perhaps no bishop could, or rather the greater number of them could not, make any lease;—if they wait until a lease be determined before they can make a new lease, then they shall be compelled to keep the lands in their own possession, and to find stock to farm them, until they can provide new tenants, which the law never could compel them to do; wherefore it seems to me on the whole question, that the lease made to Fox, the plaintiff, is good within the words and meaning of the statute."

"And on another day, *viz.* Tr. 25 Eliz. Windham, J., and Shute, B. argued this case, both for the plaintiff, that this lease made to Fox was within the letter and meaning of the statute; and they argued much in effect as Periam argued before, wherefore I will not report their argument. And in the same term, in C. B., Anderson said that they had resolved that the lease made to Fox was good, wherefore they gave judgment for him."

Leper *v.* Wroth.

The case of Leper *v.* Wroth has been much considered on this subject. Almost all the books rest the invalidity of the lease there, upon its being made to *commence at a future day*, and upon *such future estate*, under a general power, being, upon general principles, contrary to common right. The situation of the land in occupancy, at the creation of the power, is scarcely noticed. So that it may be put out of the argument as to *concurrent* leases. The case is in print, in

1 Leon. 35. 3 Leon. 130. 4 Leon. 65. Cro. Eliz. 5. It is cited and stated in 6 Co. 33. Popham 9. 1 Brownlow 149. Yelverton 222. Moor 199. 494. Latch 243. 1 Keble 911. 5 Mod. 378. 380. And in the report of Berry *v.* White, 19. 23. 31. to this effect. In Palmer 468, indeed, Jones, J., and Whitlock, J., say, that the chief reason for the decision was, that the power being once executed, it could not be executed again. Reports of the case are in the MS. collections from which the following are extracts.

(*n*) "The case of Wroth, K. B. was thus:—4 and 5 Ph. & M. a private statute was passed, by which the manor of B. was assured to the Countess of Sussex for her jointure, with a power to the Earl of S. to make a lease or leases for twenty-one years. The Earl made one lease for twenty-one years, and then made another lease for twenty-one years and a half before the other lease was expired, and the second lease was to *begin* at the end of the first lease; and the question was, if this second lease was good within the meaning of the act. *Popham* against the lease cited the case of the Lord Treasurer and Sir Walter Mildmay, who could grant leases in possession only, not in reversion, under a general commission to grant leases of the Queen's lands for twenty-one years. And he cited Marshall's case, under the statute of 1 Eliz. of bishops' leases, where the Archbishop of Canterbury made a lease for twenty-one years, and then made another lease for twenty-one years to begin at the *expiration* of the former lease; and the second lease was held bad: but he cited the great case in the Exchequer Chamber, where the second lease was in possession, and to begin and run with the first lease, and therefore was adjudged good."

"Clinch, Justice, cited the case of the Lord Marquis, who had a power to make leases for twenty-one years by a statute; and there was an old lease in being, not made by him, or by force of the statute: and he made another to begin after the end and expiration of the former. And it was doubted if his lease should be supported, for he had not made any lease before: but if both had been made by force of the statute, all held that the latter had been void."

"And again in P. 28 Eliz. Daniel argued for the lease, and Egerton, Solicitor General, against it. The latter said, amongst other things, that Wray in his reading in Lincoln's Inn, on the stat. 1 Eliz. of bishop's leases, held, that it authorized only leases for twenty-one years, to *begin* from time of the making of them, which were not to take effect from the execution, and bishops *might make any number of leases within this rule.*"

Read *v.* Nash. The case of Read and Nash, 1 Leon. 147., was relied on by Lord Mansfield as an authority for the validity of concurrent leases under certain ordinary powers; which Mr. Sugden rejects as *not* having been a decided case, but the argument only of Sir Edward Coke at

(*n*) Lansdowne MSS. 1067. fol. 134.

the bar upon a power particularly penned. Sugden on Powers, p. 602. But it is stated in Palmer 464. to have been *adjudged*; and the following note from a manuscript report of the same case will be useful in support of the opinion of Lord Mansfield.

Read and his wife against Nash (*o*). The case stated in substance as in Leonard; and Coke argues for the plaintiff in support of the lease:—but his argument is reported more accurately than in the printed book on the same points.

He first states a case of implication in a will, &c. He then argues that the will authorised both the making of a jointure, and of a lease; although in the disjunctive.

He also argues strongly, that the jointure is void as not within the power:—it was to be an estate to her, and he has made to her and himself.

He then (18. b.) argues on the reservation of the rent; "and the Justices said that he might pass that point by, because it seemed to them out of all question that it was the ancient rent, although the house was newly erected. Sir Edward Coke proceeds—"but admitting the former points to be with the plaintiff, still it is objected that this lease cannot be good, because it is found that at the time of the making of it there was a year to come of Billingford's lease; and thus this lease was a lease *in reversion*, which cannot be good. As to this objection, I grant that a lease in reversion is not warranted by this proviso; nor can Sir Thomas under it make leases in reversion, for this is against the *intent* of the will, which was, that the heir should not have his inheritance charged without bounds with leases. And this is the reason also why tenant in tail cannot make leases for twenty-one years in reversion by the statute; for then leases might be made without bounds, and so the issue for whose protection the statute was made would be injured; and so it was agreed in the Countess of Sussex's case, where she had power to make leases, that she would not make leases in reversion. Still it appears to me that this lease is good enough, for the proviso is general to warrant *all leases* for twenty-one years made in possession; and here this lease is not in reversion, but it is a lease *in esse* and being, for it was made to begin "from the day of the date of these presents," so that it never exceeded the number of twenty-one years: for in point of interest it begins now, and so does not injure the issue in tail, or heir in remainder; and in this point it may be compared to Fox and Collier's case, in which I was of counsel, 22 Eliz., where it was adjudged that if a bishop, pending an old lease for four years, make a new lease for twenty-one years, to begin now, with the ancient rent, that it is a good lease within the statute of 1 Eliz.: but in that case it was also agreed, that if a bishop make a lease for years, and then make a lease

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(*o*) Harleian MSS. 2036. fol. 18.

for three lives, that it is not a lease for three lives within the statute; inasmuch as the reversion passed by this lease for three lives, and the rent also which was reserved on the lease for years; and so the successor would be injured in regard to his rent, which mischief did not arise in Collier's case."—And on this point he cited Southwell's case, likewise tending to the same effect;—"and so is the opinion of Weston and Browne, 7 & 8 Eliz. 246. on the statute 32 H. 8. that if the lease exceed not the number of twenty-one years, although it be made to begin at a future day, still it shall be good: as if tenant in tail make a lease for eleven years, to commence ten years hence, that is a good lease by the statute of 32 H. 8., because the land was not in lease for more than twenty-one years."

"Godfrey:—the case is (as appears before) and it seems to me that the plaintiff is barred. The points in the special verdict are—1st, if by the words or intent of the will, Sir T. Gresham having but an estate for life, can make leases for three lives, or twenty-one years, to continue and be good after his death; and as to this, it seems to me that he cannot. 2dly, If the jointure be good or not?—For his power being in the disjunctive, after that he had made a lease for twenty-one years, this is void;—and it seems to me that the jointure is good: but admitting it to be void, then the validity of the fine is to be considered whether it be good; and so it appears to be, and then Sir Thomas had by it forfeited all his estate.

As to the first point Coke had argued that a power was given by the words, *otherwise, &c.* (Godfrey then admits that an authority is given to Sir Thomas to a certain extent, but not so as to enable him contrary to the rule of law to make leases. The argument seems acute on the point of covenants to stand seised in which such power to tenants for life fail.)" And Godfrey then proceeds:—

"Likewise this lease is void for a third reason; for if he had such authority, still he has not pursued it; for the power given to him is to make leases for twenty-one years, on which the ancient and usual rent is to be reserved and payable. Here it is found that the ancient rent is reserved: but it is not found that it is payable to them in remainder or reversion."

"Likewise for a fourth reason the lease is void: the authority is to make leases for twenty-one years, then 3 & 4 P. and M. he makes a lease to Billingford for twenty-one years, and this lease being *in esse* for a year to come, he makes this lease to Read and his wife. And here although I agree that this lease is a lease, in point of interest, station, and no lease in reversion, still now by the finding of the Jury it appears that the Court ought to abate, for he has counted on a lease for twenty-one years, where in reality it is but a lease for twenty years, and that for this reason the count ought to abate, it was determined in the case of Stapleton and Brian."

He then argues on the non-reservation of the rent for the building of the new house, which point was overruled by the whole Court—on the person being in the disjunctive, and that both leases and jointure being made, both were void—on the levying of the fine which destroyed the life estate, and so the lease after granted was bad: and concluding by remarking that the objection of Nash not having shewn a title was immaterial, because the trial being in ejectment on the lease—if that lease were bad for any of the preceding reasons, the plaintiff could not recover; and so he prayed *quod querens nihil capiat per billam.*—

Coke replies to the first point—that a power was duly given by *implication*, and discusses cases of implication; and proceeds—

"Then as to the objection that the lease to Billingford was not expired; in this the exception was twofold,—1st, To the declaration, and then to the lease itself. On the latter point we agree that he cannot make a lease *in reversion; and the doubt rests on the count.* And as to that, it appears to me to be good; for all the words of it are seen, and ought to agree with the demise, inasmuch as we cannot declare in another manner, and so this slip is not very material."

He then argued on the "great knot" of the case—upon the *jointure*—if it were good in respect of conveyance or not. And he urged that having but a life estate and power, he could not stand seized to an use beyond the former; and for other reasons that the jointure was bad. He closed his argument by praying judgment for the plaintiff.

The manuscript, fol. 37, then refers for the "Resid." to "185,"—or "85,"—which is wanting in the volume—Harl. 2036. But in the Lansdowne MSS. 1076, fol. 21, a continuation of this case seems to have been bound up with others.

Pasch. 33 Eliz. Lansdowne MSS. 1076, fol. 21. "Tanfield argued for the defendant, that if the tenant for life had a power, still, as the case was, he had not pursued it. For he made a lease to Billingford first; and that was in being at the time of the lease to Read, wherefore the latter lease could not be good; for his power was only to lease for twenty-one years in possession, and that could not be made there, nor could lease in reversion be made. As if a letter of attorney were given to any one to make leases for twenty-one years, and he make a lease for twenty-one years, when ten years of another lease were in being, that would not be good, since it cannot be a lease for twenty-one years, although it had been said that it might be a good lease by estoppel: and that the defendant is estopped by a deed indented to say that it is a bad lease for twenty-one years. So as it is confessed, he is not in by the lessor for life, but by the testator. And the lessee did not make the lease from himself, but as an instrument to pass it, wherefore there could be no estoppel."

He then argues on the point of the jointure; and proceeds—

"Cooke argued that the tenant for life had a sufficient power, and had exercised it well; inasmuch as he had not exceeded the number of years limited. He said tenant in tail might make leases to commence at the following Michaelmas for twenty years. So also in Fox's case, where a bishop had made a lease for twenty-one years, and when ten years of that lease were in being, he made another lease for twenty-one years by deed indented; and it was good, inasmuch as he did no wrong to the successor, and did not exceed the number of years limited by the statute, and as the lease began presently, and was not a great charge on the inheritance. But in the principal case it is a lease by conclusion, although he had no interest nor authority to make a lease."

The argument concludes on other points—and he prays judgment for the plaintiff.

The case is continued in p. 35, b. of the same volume.

"Trin. 33 Eliz. Reg. Lansd. MSS. 1076, fol. 35. b.—The case of Read and Nash was moved this term on this point, whether the fine created a forfeiture or not. The Jury had found that he was seised of divers messuages and tenements in Yorkshire, mentioned in the will, and that by the will he devises all his lands in G., adjoining to Towne that were of the value of 10*l. per annum*, and the tenth of this is 20*s*. Cooke moved that this was an uncertain finding.—Three Justices, *absente* Wray, hold the verdict certainly enough found; and thus it was found that a fine was levied of his lands in Gunthorpe, which was *a forfeiture of* the estate of Sir Thomas Gresham; and then the lease made afterwards to the plaintiff was void, wherefore *judgment was given that he should take nothing per billam*."

Harcourt v. Pole.

Harcourt and Pole, 1 Anderson 273., has been thought an authority for a lease to begin at a future day, (*m*) under a power to make any lease for any number of years not exceeding ninety-nine years from the time of making such demise.

But it has been overlooked that the case mentioned in Anderson to have been determined by a majority of the Judges in favour of the future lease was tried again in the next year, in another Court, when a *contrary* judgment was delivered. The latter determination seems to restore the consistancy of the old cases. Moor 733., *in the margin*, cited by Mr. Powell for another purpose, p. 435, &c. 2d edit.

Evans v. Ascuith.

Evans v. Ascuith involved this point: but *it was decided on another* The lease in question was a concurrent ecclesiastical lease; and, as such supported on the authority of Fox and Collier. Sir W. Jones 16 And in the final judgment the two Judges who doubted of the

(*m*) Sugden on Powers 587., 3d edit.

of concurrent leases confined their attention to *other* points of the case. See all the reports, printed, and in manuscript.

The following note is taken from the Hargrave Collection, No. 38, fol. 156. "Jones, J. At the common law it was lawful for a bishop, &c. with the consent to grant leases for any number of years that he pleased. Then came the Statute of Leases, 32 H. 8. before which the bishop could do nothing of himself, except for his own life; and this statute was made in favour of the present incumbents, and the former that he might make leases without a confirmation, observing the limitations directed by the statute: but he could not make leases in reversion or concurrent leases; but still a bishop might make any lease with confirmation of dean and chapter as long as he pleased. And then came the statute of 1 Eliz. which enacts that all gifts and grants, &c. made by a bishop should be void other than leases for twenty-one years, or three lives, &c. This statute never had reference to the present incumbent, or the former, but the successors; and for this reason I say that this concurring lease is not void, for it is a lease for twenty-one years, and is not to begin beyond the time of making; and it is within the words of the act. But if it had been a lease for twenty-two years, it would not have been within the statute: but it being for twenty-one years, it is within the statute; and being for no longer time, it is within the words, and also the meaning of the act; for no more prejudice can come to the successor than if he had a bare lease in possession. Then for the lessee in possession, how is it insufficient on his account? The act was not made in favour of him; and the meaning of the statute is that there should not be more than twenty-one years after the decease of a bishop, and so there will not be. If there be a lease dispunishable of waste, it would be void, as a lease for three lives, one after another, although this be good within the words of the statute, still it is not good by the meaning; and a lease being for twenty-one years, and after another lease for three lives, is not good, because no distress can be made; nor will an action of debt lie. But here there is no hindrance of an action of waste, or of distress; and the second lessee may be charged for the arrears: and here the case of the Earl of Sussex was objected to this lease. A private act of parliament was made to settle land, "provided that he might make leases for twenty-one years, or three lives." He made a lease for twenty-one years, and afterwards he made another lease to begin *after* the former; and there a difference is taken between a private power given to a tenant for life which he had not by the common law which shall be strictly construed: but here it takes away the power of the bishop, wherefore the act shall be construed largely. And another reason was, that where a proviso is made for one *to make leases*

Harg. No. 38, fol. 156. b. S. C. Lansd. MSS. No. 1083, fol. 118. and No. 1092, fol. 190, b.

for twenty-one years, who makes *one* lease under it, that he shall not make another.

"The Lord Popham there put a case of the Marquis of N. who had a power under a private act of parliament to make leases for twenty-one years, &c. and one lease was made; and *he* made another lease to begin after: and it was a good lease, because he had not executed his power. Then 18 Eliz. was passed because concurrent leases were inconvenient, &c.: but the lease was not void then, and they were fain to make a private statute to restrain them. But this extends not to former leases. But here no power is conferred by the statute; and, therefore, the lease is good: and this is a resolution, and not an opinion. So he concludes for the plaintiff."

Doddridge argues on the *other* points at great length, and Hide, C. J.: but they do not notice the point of concurrency.

The true ground of the decision also in Shecomb and Hawkins also supports the general principle as to common right. Cro. Jac. 318, Yelverton 222., and 1 Brownlow 148.

Rokeley, J. in Winter *v.* Loveday, 5 Mod. 380. treats both these cases and Leper and Wroth as equal authorities against leases being made to commence at a future day, under a general power created by a reversioner. His lordship does not notice whether or not the lands were in lease at the time of the power created: it seems that they were then in tenancy, which he certainly did not consider as material to the question; although it would have operated against his opinion, if *relevant* to the point. Nor does it appear to have been weighed in Shecomb *v.* Hawkins, either by Croke or by Yelverton. Croke, therefore, may possibly be in error with respect to this circumstance in his report, p. 318. Cro. Jac.; and yet he may have placed the invalidity of the lease in question on the proper grounds, the fact as to occupancy in *this* case being *immaterial*.

So far, therefore, as relates to the lands having been in lease at the making of the settlement, or not, Mr. Powell, p. 421, and Mr. Sugden, p. 583, of their treatises, (and Winnington, *arguendo*, in Opy *v.* Thomasius, T. Raymond 132, and Serj. Cummins, *arguendo*, in Coventry *v.* Coventry, 2 Osb. MSS. 112, Lincoln's Inn Library,) seem to have *unnecessarily* remarked the difference between Croke and Yelverton's reports of this case of Shecomb *v.* Hawkins. If the question had been on a *concurrent* lease, the inaccuracy of one of the reporters would have been material.

Baynes *v.* Belson.

The case of Baynes *v.* Belson, T. Raym. 247. seems to be perfectly consistent with the preceding authorities. The power there is *general*; the lease made under it was to commence at a future day *in* reversion; and no peculiar circumstances are to be discovered in the case

to justify the lease, which was decided to be void. The decision relies on the last case; and Leper and Wroth, with respect to powers, and on Colt's case, in Hobart 151, for a more general principle of construction of general words.

Mr. Sugden, following Mr. Powell, seems to consider this decision doubtful, as if it was founded on cases determined with reference to the *occupation* of the land. It is, however, submitted, that the point in Baynes *v.* Belson, as well as Leper *v.* Wroth, and Shecomb *v.* Hawkins, is founded on general principles, and rightly, and that a reference to the actual possession would have been improper. The reference to the passage in Colt's case seems particularly to justify this conclusion; and taken as a link connecting the three authorities, as it were with an overruling master principle, it seems reasonable to reject from our consideration minor incidents as inoperative; and it is at least important to avoid the error of adopting as a cause that which does not affect the subject.

Opy *v.* Thomasius.

With respect to Opy *v.* Thomasius, it seems to be clear that no judgment was ever given in the case, Holt, C. J., in Coventry *v.* Coventry, 27th April, 1719.; 2 Osb. MSS. p. 112. Lincoln's Inn Lib. In Raymond 132. a reversioner limits an estate tail, with a *special* leasing power, *viz.* "for the tenant in tail to make leases *in* possession;" which, it is there *admitted*, will not authorise a lease *for years*, to commence at a future day; and this it seems difficult to dispute. The doctrine, however, collected from the case by Mr. Powell and Mr. Sugden should be investigated. In 1 Lev. 167. the second lease is stated to have been for the life of the defendant—a freehold lease, which was declared to be void under the words of the power, "to make leases in possession:" but Wyndham and Twysden, Justices, are there said to have held that the settlement being "of a reversion, if the words of the power had been *general—to make leases*,—a lease of the reversion, or a lease in reversion had been within it." Upon this *dictum* it is submitted that a *concurrent* lease only was in the contemplation of the Judges, and that a lease to *commence* at a future day, as implied in the two treatises on Powers (that of Mr. Powell 421. and that of Mr. Sugden 583, 4.) ought not to be inferred to have been sanctioned by them, when the very confused state of the reports of the case is taken into consideration. See 1 Keble 911 also; and Lansd. MSS. No. 1064. fol. 127. Although the distinction between concurrent leases, and leases to commence *in futuro*, seems to have been clearly recognised at an early day (4 Leon. 65.—1 Leon. 36.) still the terms "in reversion" are loosely applied by the reporters. In 3 Leon. 72. Haydon's case is stated to have been under a general power, and of leases granted "*in reversion*" for three lives; and in it the force of the power appears to have been discussed. If by the terms "*in re-*

version" the reporter had meant a lease to commence in estate at a future day, and not a concurrent lease, it seems clear that its invalidity would have been determined without reference to the power at all, or to any other circumstance than to the fact of its being a freehold.

Winter *v.* Loveday.

The case of Winter *v.* Loveday is variously reported:—The case seems to have been decided partly upon a critical "*reading*" of the *several* clauses of the power. It seems to be clear that the three Judges who held the lease to be good in respect of its being made to commence at a future day founded themselves on what they thought to be a proper connecting of the general words of the power with the *special permission* that the lease should be made for thirty-one years; whilst Rokeby, J. read the power as *merely general*, and then classed the case with those in which leases under general powers were held to be invalid if made to commence at a future day. The difference of opinion related to the fact of the power being *general* or *special;* and did not arise from different principles of reasoning on the point in question. It does not appear that the three Judges would have disapproved of Rokeby's construction of the power, *as he read the clauses of it:* but *they* thought the clauses were intended *to be taken together*, which his lordship denied. The judgment attributed to Mr. Justice Eyre, in 5 Mod. 378. seems strongly to confirm this.

Coventry *v.* Coventry.

Upon the case of Coventry and Coventry, which Mr. Powell cites as an authority in favour of leases in reversion under these powers, it may be sufficient after what Mr. Sugden had said upon the case, to remark that the power there seems to have been called *general*, incorrectly. In the MS. quoted in the Treatise on Powers, 3d edit. 586, it is further urged by Mr. Williams, amongst other things, "that if a covenant to lease any land for twenty-one years, without any time mentioned, it should be construed to commence presently, 6 Co. 33. 1 Roll. Ab. 841. 1 Inst. 46. b. To which argument Holt, C. J. is reported to have observed "that by a general power of leasing it would not be contended that a lease in reversion could be made." From which it may be inferred that in the opinion of the Court the power in question was *special*. In another manuscript, 8 Leeds MSS. p. 117. Lincoln's Inn Library, is the case of Coventry and Coventry as argued by Peere Williams and Serjeant Cummins, of which the following passage is an extract:—"Serjeant Cummins said, I agree in all cases when a settlement made of lands in possession gives such a power to make leases, the leases must be made in possesssion; or otherwise they will not be justified by the power, 6 Rep. 33: but when a settlement is made of lands not in possession, but in reversion, then reversionary leases are good. There are but two exceptions to the latter: 1. When the power expressly restrains to lease in possession, then, though the lands were in reversion at the creation of the power, it will

justify only leases in possession; and this was the very case of Lady Mohun; and so too the case of Duke of Bucks and Lord Antrim, the power was the same, and so resolved by the Lord Chief Justice Bridgman and Hales; and so in the case 1 Lev. 167. 2dly, I agree that if he who has power *to make leases* has once executed that power by making a lease pursuant to it, he cannot make a subsequent lease *till* the former is determined, which was the case of the Countess of Sussex, and Shecomb *v.* Hawkins, which is not so well in Croke as in Yelverton; for then the persons who made the leases had before executed that power, and was *in esse* at the time of making the said lease."

He also relied on the *so as, &c.*, which he agreed was restrictive; but only as to the number of years for which leases should be made, but do not restrain making leases.

"C. J. said he would give no opinion; but seemed inclined to think that these leases were good, the lands being in reversion at the time of making the power. But as to the commencement of these leases they seemed ill; for he said a lease in reversion must commence after determination of former lease; and for a lease to commence after the death of J. S. is not the same with me as a lease to commence on the determination of a lease for years determinable on the death of J. S. Adjourned,—*but never determined as Mr. Phillips tells me.*"

The opinion of several modern judges (*c*) are very clearly in favour of *concurrent* leases under *certain private* powers; and without considering at present how the doctrine was applicable to the cases which they were deciding, their dicta must be admitted to be important, if connected with the early decisions by the recognition of the same principle in various intermediate books.

Goodtitle *v.* Funucan.

With respect to Goodtitle *v.* Funucan, Douglas 568. it seems difficult to admit the propriety of Lord Mansfield's judgment as to the lease being valid in concurrency. The report is, perhaps, inaccurate; Mr. Sugden has remarked that the statute of 13 Eliz. c. 10. is inserted in it instead of the statute of 1 Eliz. c. 19. and the words of the statute are certainly *misstated* to "require as strongly ecclesiastical leases to be in possession, and not in reversion, as those in this or any of the common powers to tenants for life." So far from the fact being so, the case of Fox and Collier is directly reported to have been out of any restrictive *words* of the statute of 1 Eliz. c. 19. But Fox and Collier was a case of a *general* power; whereas that in Goodtitle *v.*

(*c*) Lord Mansfield in Goodtitle *v.* Funucan, Douglas 568.; Grose, Lawrence, and Le Blanc, Justices, in a recent case. See Sugden on Powers, 596. Doe *v.* Calvert, 2 East. 375.; and Lord Ellenborough in Roe *v.* Prideaux, 10 East. 184.

Funucan is very *specially worded:*—it is for tenants for life being in "*actual possession*" of the lands, to demise them "in possession, but not by way of reversion or future interest." The power in Read and Nash also is general; it is contained in a proviso for forfeiture of the estate limited to A. B., &c., if A. B. should make alienations, &c., whereby the premises should not remain in the form appointed by the will "otherwise than for jointures for their wives, or leases for twenty-one years, whereupon the old and accustomed rent should be reserved."

Roe v. Prideaux.

The *dicta* in the case of Roe *v.* Prideaux, 10 East. 184. depend on Goodtitle *v.* Funucan, and seem not to be sound. Besides that it was decided on a strong principle mentioned in Whitlock's case, the objection of the lease being made to commence *in futuro* does not seem to have been considered by Lord Ellenborough; and the force of the direction that the donees of the power were to be "in *actual* possession of the premises" is entirely disregarded. But the *terms in which the power is expressed* may be said to be strong enough to preclude concurrent leases.

Doe v. Calvert.

The case of Doe *v.* Calvert, 2 East. 375. was also upon a lease *in futuro* under a special power clearly restricting the party from making such grants: but it does not appear to be so strongly worded against concurrent leases in one respect as Goodtitle *v.* Funucan. It permits "tenants for life in actual possession, *or actually entitled to the rents and profits* of the lands, to make the leases;" whereas in the latter case persons "in actual possession" only are so enabled. But the subsequent prohibition of leases "in remainder, reversion, or *expectancy*," would probably be held sufficiently clear to render a concurrent lease void. However it is submitted that to class powers so worded with the general power of Read and Nash, and Fox and Collier is to confound the true principle of construction on this subject.

Shaw v. Summers.

The last case on the subject is Shaw *v.* Summers, 3 Moore 196, 1819, which fully confirms these ancient and uniform principles of decision. By a general power trustees were authorized to let the lands for *such term and time*, not exceeding twenty-one years, as they should think fit. After granting a lease to A. B. for ten years, they demised the lands again to C. D. for the remaining eleven years, the second lease being to commence after the expiration of the former; and the second lease was certified by the Court of Common Pleas to the Master of the Rolls, to be void. The distinction between this case and that of Fox and Collier in the extent of the words has been before noticed, p. 593, where the Editor has ventured to state what appears to him to be Sir Orlando Bridgman's principles, and which he submits are supported by the foregoing view of the cases.

G.

(See p. 109.)

The MARQUIS OF ANTRIM *v.* The DUKE OF BUCKINGHAM.

In Chancery.

Lib. Reg. 1662. B. fol. 377.

"The plaintiff's suit being to have a lease made good in equity, which was made by Catherine late Duchess of Buckingham for the payment of certain debts alleged to have been contracted by the said Duchess who, as the plaintiff's bill sets forth, being seised in fee of several manors, lands, and tenements, and being indebted to several persons,—by indenture dated in June, 1633, and a fine, to raise money for payment of her debts, and for other considerations, did settle the premises to the use of herself for life sans waste, the remainder to the defendant the Duke of Buckingham her son, in tail mail with remainder over, with a proviso and power reserved, "*that it should be lawful for her during her life by any deed or deeds indented to grant the premises or any part thereof, for twenty-one years in possession, or two or three lives in possession,* whereupon the then yearly rent or more should be reserved and payable during the term to her and such persons to whom the immediate reversion or remainder should belong;"—and afterwards she intermarried with plaintiff; and in October, 1649, after the intermarriage, the plaintiff and the Duchess leased the premises for twenty-one years to Richard Earl of W , Oliver Lord B of L , and James Stewart, esquire, their executors and assigns, in trust for the said Countess, but principally to raise money to pay her debts, for which the plaintiffs Archibald Steward and John Traylman stood bound; which trust, although not expressed in the lease, was declared by writing under the hands and seals of the lessees. And shortly after the making of the said lease the said Duchess and also James Steward, one of the trustees, died. And in September, 1660, the surviving trustees with the plaintiff's consent, and for her benefit, assigned their interest in the premises to the defendants Cox and Robert Castle,—who refused to execute their trust, and who permit the defendant, the Duke of Buckingham, to take the profits of the premises; by means whereof the plaintiff cannot be reimbursed the money he hath really paid in discharge of part of the said debt, but is likely to be charged with all the debts contracted by the Duchess out of his own estate, so as to

have the said lease made good in equity, and to compel the said defendant the Duke to suffer the other defendants to take the profits during the lease to pay the said debts, according to the intention of the Duchess, and that the said Duke may account for the profits received by him or his agents, is the prayer of the bill."

"Whereunto it was insisted by the counsel for the defendant the Duke of Buckingham, that the said Duke having put in an answer and plea, sets forth by way of answer, that it doth not appear that the lease aforesaid was made in trust to raise money to discharge the debts of the Duchess, who, he believes, was not indebted at the making of the settlement; or if she were, it concerned not him, there being no provision by the settlement to raise money to pay her debts by any lease to be afterwards made; and therefore, if the said lease had been made upon such trust as is pretended by the plaintiff, it was *not pursuant to the power* reserved on the settlement, and for plea, saith that the Duchess at the time of the settlement made was seised of the premises not in possession, but in reversion expectant upon the death of Cicely, Countess of Rutland, who was living at the time of the lease, and was seised of the premises for the term of her life, and afterwards, whilst the said Countess was so seised, the duchess was disabled to make any lease for years in possession, and therefore the lease in question was unwarrantably made, and so had been *if the Duchess had been sole* at the time of the making thereof, and was not pursuant to the power in the settlement. The Court hereupon, and upon debate of the matter, saw no cause of equity to give the plaintiff any relief; and doth therefore order that the matter of the plaintiff's bill be from henceforth clearly and absolutely dismissed out of this Court, with costs."

H.

(See p. 251.)

STONE *v.* WALTER.

Ter. St. Hil. anno 1 & 2 Car. 2. Intr. Pasch. 1649. Rot. 258.

Harg. MS. No. 42. fol. 243.

A report of the case of Stone *v.* Walter illustrates the argument of the Chief Justice against the inference drawn from the practice after the abolition of the ecclesiastical courts, and the *legal necessity* arising thereupon.

"In an action on the case on *indebitatus assumpsit* for wares sold; on *non assumpsit* pleaded the Jury find a special verdict to this effect:—that the plaintiff did deliver, the day mentioned in the declaration, the goods to Elizabeth Walter, then and now the wife of the said defendant, she then living in London, without the assent or knowledge of the aforesaid Walter; and that the said Elizabeth then and there promised to pay to the plaintiff 10*l.* for the said wares. And they further find that before the sale and delivery aforesaid the said Elizabeth was departed from her husband, and refused to cohabit with him; and they further find that the defendant was willing, and did offer to pay to the said Elizabeth sufficient maintenance if she would cohabit with him, and that Elizabeth did refuse to cohabit with him. They further find that at the time of the promise, and divers years before that time past, the aforesaid Elizabeth had no maintenance from the said Walter; and they find that the plaintiff had *no notice* of the departure of the said Elizabeth from the aforesaid Walter, nor of any willingness nor offer of the said Walter; and that the said wares were employed by the aforesaid Elizabeth for the necessary use of the said Elizabeth. But if upon the whole matter it shall appear to the Court that Walter did assume, then they find for the plaintiff; if not, then for the defendant.

And it was argued by Wyld for the plaintiff. And that the baron should be charged.

First, he agreed that generally by the common law a feme covert without the consent of her husband cannot make any contract to the prejudice of her baron; and with this agrees 20 H. 6. 21. 21 H. 7. 4. But the contract in the case at bar is not to the prejudice of her baron, for by the law of nature the baron is bound to provide for his feme; for the two together are only one person; and, consequently, that which is for the maintenance of the feme is for the maintenance of the baron.

Secondly, The feme is without remedy to provide for herself, (if in such a contract as this is in the case *in question* the baron shall not be charged) for by the intermarriage the law gives all her goods and chattels to the baron; and without his consent she cannot dispose of any of them, or of any of the goods of her baron; and if she do so, the baron can have his action against him who buys or receives them from his feme.

And as to the objection which had been made that if this contract should charge the baron, it would give a greater power to the feme, which would be inconvenint, he said that the feme shall charge her baron by such a contract for nothing more than is accordant with her estate, or than she ought to have, if they had cohabited.

As to the opinion of Fineux in 21 H. 7. 40., he denied it to be law, for the book of 20 H. 6. 21. is to the contrary.

"And if such a contract as this is in the case in question shall not charge the baron, this mischief will ensue, that if the baron departs from his wife, and will not allow her maintenance, she will perish; for she has no other way to relieve herself, for sell the goods she cannot as has been said, nor can the wife buy any thing with the husband's money; for he can have an action for the money against him who receives it from his wife; and so no man will meddle with the wife."

"The case was not argued on the other side, but adjourned to a future day, before which time the plaintiff died; wherefore the case was not moved again. But the Court inclined to think that the action was maintainable against the husband *as this case stood.* And Rolle, Chief Justice, cited the opinions of all the Judges of England, at the beginning of the present parliament, upon a reference by the House of Lords to them on this question,—*Whether there is any law to compel the husband to give alimony to his wife.* And all the Judges delivered their opinion, *that there was no such law. Wherefore* she was enabled to make a contract for things needful to her, and that such contract should bind her husband."

I.

(See p. 255. n. (*w*).)

The Editor has not been successful in a very careful search for further reports of *the Banker's case* mentioned above in note (*w*), p. 255. What is usually called by that name arose out of the same profligate act of King Charles the Second, *the shutting of the Exchequer* which occasioned the suit noticed in p. 254, n. (*w*), above: but it relates to the proceedings of the bankers against the crown under the indemnities granted to them after they were compelled to be answerable to their own creditors.

Lord Camden's words are remarkable against the distinction slightly recognized by Sir Orlando Bridgman, between *public* and *private* necessities: "I know of no distinction between *state* necessities and others; our books do not make any such distinction; and we find in 3 Car. 1. Mr. Serjeant Ashly was committed to the Tower for saying in one of his arguments at the bar there was a state power, or law of the state, as well as of the country. And the Judges, with respect to ship money, were committed for saying, there was a state necessity for it."—Judgment in Entick *v.* Carrington, C. B. Mich. 1765. Pratt, C. J., 11 State Trials.

See on this subject Pothier by Evans, Vol: I. p. 439, n. (*e*). 1 Fonblanque 374, n. (8), and Wright *v.* Simpson, 6 Ves. 728., and the cases cited there. And the discussions in parliament on the orders in council in 1763.

K.

(P. 334.)

BENYON *v.* EVELYN.

"Not *reporting*, nor *questioning* out of the parliament what is said in parliament are, as it were, of the essence of the parliament, and not dispensable withal," &c.

The general usage of parliament on the former of these points is entirely changed since the restoration; (*a*) and late transactions have done much to establish that from such change has followed the right, under certain circumstances, to "*question* what is said in parliament." The new rule seems to be dangerous so far only as the irrational principle of compromising differences by means of duelling was countenanced by the unrebaked tendency of the "questioning" upon the occasion alluded to. See the debates and journals of the House of Commons for the 9th and 17th days of July, 1822, in the case of the Scotch advocates.

In this case particular grounds of justification were understood to protect the parties charged with breach of privilege; and the declaration on the journals, "that taking notice of the speeches of members of the House is a breach of privilege," seems to constitute an example of adherence to form after the substance of a rule has vanished.

In other respects the practice on both points may be said to be fixed on a reasonable basis; namely, that in ordinary cases the proceedings of parliament are to be made known to the public; and that if what passes is injurious to persons out of parliament, they are entitled to such vindication as is consistent with the true dignity of the parliament itself.

The necessity of freedom of speech in parliament is only to be inferred from its tending to the due performance of the duties of the

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(*a*) See amongst many other proofs of the usage of parliament, Lord John Russel's Essay on the Constitution, p. 466, 2d edit. Mr. Wynne's Argument, p. 59, &c. and Mr. Burdon's "brief Treatise on the Privileges of the House of Commons."

members: but it is equally clear that the people should know what passes there, *if* their interests will by that means be best guarded. It is understood that a vote of either house of parliament is notice to all the world; which could scarcely be, if by no diligence it was competent to attain knowledge of it; and even in the arbitrary reign of Henry the Eighth, the Lord Chancellor dismisses the Commons' House, with an injunction "to report in their counties what they had seen and heard."—What the members were thus injoined to do for the people, the facilities of the press enable us to effect now most conveniently for ourselves.

It is remarkable that neither Sir Edward Coke, 4 Inst. 8., nor Sir William Blackstone, specifies the "not reporting" as one of the privileges of parliament; and Mr. Justice Doddridge, in enumerating the *essential* rights of the Commons, states only "lawful summons, free election, liberty of admission into the House, a quiet session there, with a just freedom of speech and debate without fear or disturbance." See the book called *The several Opinions of sundry learned Antiquaries touching the Parliament of England.*

The claim to secrecy of debate, and of proceedings, may be traced perhaps to an apprehension of the power of the Crown, which is no longer exercised through this medium of personal intimidation. In 1410 it was ordained that it should be "lawful as well for the Lords by themselves as to the Commons by themselves to debate of all matters relating to the realm without disclosing the same *to the King* before a determination made thereof, and that to be done only by the mouth of the Speaker," Cobbet's Parliamentary History, Vol. I. p. 308. It was at that time a reasonable desire that the share which individuals might take in certain measures should not be betrayed to the Crown, since the whole body was scarcely secure against regal encroachment. In the preceding reign a member had been adjudged guilty of treason upon a bill which he brought into parliament to restrain the corrupt manners of the court. 1 Parl. Hist. 222. Cotton's Ab. 361, 362. Hume's Hist., Rich. 2. note O.

The struggle between independence of deliberation and undue influence continued to be violent throughout the reigns of Elizabeth and the Stuarts. This danger might perhaps justify the old claim, which indeed was sometimes put forth with a jealousy only to be rationally accounted for by the peculiar circumstances of the times. In 1588, Feb. 15, "by consent of the House admonition was given to the members of the House of Commons that speeches should not be made table talk, nor given in notes in writing to any not members of the House." Observations, rules, and orders, collected out of divers journals of the House of Commons, 1717, p. 44. This year 1588, was however one of great national hazard, when the measures of government might well

be guarded with peculiar jealousy: but the admonition itself shews not only the rule, but that the *practice* ran counter to it; which the circumstances *of the time alone* might render it fitting to restrain. In the gross case of libel by Hall, a member of the House of Commons, in 23 Eliz., the "publishing the conferences of the Houses abroad in print" appears to have been *coupled* with many highly offensive acts; Sir Simon D'Ewe's Journals 291, &c. and the Journals of the House of Commons, Vol. I. p. 122—125, &c.—and in the Bishop of Bristol's case in 1604, 1 Hatsell 233, 3d edit. and the Journals of the House of Commons, Vol. I. p. 226, &c. 251—1000, the Commons grounded their proceedings upon *heavy charges*. But that the *mere* "reporting" mentioned in the text prevailed, without the imputation or consciousness of offence, the preface to the Ephemeris Parliamentaria, and the existence of Sir D'Ewe's Journal, and of Hakewil's and other collections, furnish strong presumptive proof.

In the publication of parliamentary papers, transactions of Committees, and of daily orders, and in many other respects, the asserted ancient rule is, and in almost all periods has been, infringed with the greatest advantage. In most of the cases also the offence has been, noticing the proceedings *injuriously*; although it cannot be denied that plain precedents, in good times, may be produced, of the calm denial of the right of the public to access to the deliberation of parliament. If, however, experience has proved that the public business in parliament is best done after full discussion, and by enjoying the advantage of *voluntary* intelligence from the public, it is difficult to conceive how this can be secured so well as by continuing to the public access to the debates and proceedings.

It may then be concluded, perhaps, that *merely* reporting, or merely questioning, what passes in parliament, ought not to be held a breach of privilege, and that now *usage* is placing upon sound foundations those rules which something like usurpation at some periods, and necessity at others, had carried to a rigour no longer tolerable.

The following references will assist the enquirer to trace the usage of parliament, and its changes on this subject.

1662. The first instance in Hatsell of an order for strangers to withdraw, Vol. II. p. 171. Earlier instances are known.

1697. Journals of the Commons, Vol. XII. p. 48. The case of Dyer, a news letter-writer, for meddling with the debates.

1697. ——————————————— p. 661. Vote, that publishing the names of members, and reflecting on them, and misrepresenting their proceedings in parliament, is destructive of the freedom of parliament.

1703. Journals of the Commons, Vol. XIV. p. 270. As to false reports, and *meddling* with the proceedings.

1711. ——————————— Vol. XVI. pp. 660, 672. Sir H. Mackworth's case, for reflecting on a bill before the house.

1722. ——————————— Vol. XX. pp. 133, 143, 149. Printing a Report of a Committee of the House of Commons voted a breach of privilege.

1735. ——————————— Vol. XXII. p. 713. Vote, That one Rayner was guilty of a breach of privilege for printing a bill pending in the House, and also a proceeding of the House in it.

1745. ——————————— Vol. XXV. pp. 79, 81. As to publishing minutes.

1747. Parliamentary History, Vol. XIV. p. 57. The case of the publishers of the Debates in Magazines.

1763. Mr. Wilkes' case, &c.

1770. Parliamentary History, Vol. XVI. pp. 1317, 1319. As to the clearing the House of Lords of Strangers, and the protest for so doing.

1807. Parliamentary Debates, Vol. IX. p. 744. On the standing order of the House of Commons for the exclusion of strangers.—Mr. Gale Jones's case.

——————————— Vol. X. p. 214. As to the publication of the lists of members voting.

——————————— p. 219. On the Board of Admiralty taking notice of a motion of the House of Commons.

——————————— pp. 323, 481. On the exclusion of strangers.

1810. ——————————— Vol. XVII. p. 657. On the exclusion of strangers.

1812. ——————————— Vol. XXIII. p. 548. The case of the Day Newspaper.

1813. ——————————— Vol. XXIV. p. 518. The case of the British Press Newspaper.

1817. ——————————— Vol. XXXVI. p. 243. The case of the Rev. Mr. Thirlwall.

——————————— p. 882. On the publication of Parliamentary papers.

1819. ——————————— Vol. XL. pp. 1163, 1188, 1195. On misreporting.

17th July, 1822. ——————————— The case of the Scotch Advocates.

L.

(P. 339.)

" In the Lent season, whilst the Parliament yet continued, one George Ferrers, gentleman, servant to the King, being elected a burgess for the towne of Plimmouth, in the county of Devon, in going to the Parliament House, was arrested in London by a process out of the King's Bench, at the suit of one White, for the sum of 200 marks, or thereabouts, wherein he was late afore condemned, as surety for the debt of one Welden of Salisbury; which arrest being signified to Sir Thomas Moile, knight, then Speaker of the Parliament, and to the Knights and Burgesses there, order was taken that the Serjeant of the Parliament, called S. J., should forthwith repair to the Counter in Bread-street, whither the said Ferrers was carried, and there to demand delivery of the prisoner. Thereupon the serjeant, as he had in charge, went to the Counter, and declared to the Clerks there what he had in commandment: but they, and other officers of the City, were so far from obeying the said commandment, that, after many stout words, they forcibly resisted the said serjeant; whereof ensued a fray within the counter gates, between the said Ferrers and the said officers, not without hurt of either part, so that the said serjeant was driven to defend himself with his mace of armes, and had the crown thereof broken by bearing off a stroke, and his man stroken down. During this brawle, the Sheriffs of London, called Rowland Hill and H. Suckley, came thither; to whom the serjeant complained of this injury, and required of them the delivery of the said burgess as afore: but they bearing with their officers, made little account either of his complaint or of his message, rejecting the same contemptuously, with much proud language, so as the serjeant was forced to return without the prisoner; and finding the Speaker, and all the Knights and Burgesses, set in their places, declared unto them the whole cause, as it fell out; who took the same in so ill part, that they all together (of whom there were not a few, as well of the King's Privy Counsel, as also of his Privy Chamber,) would sit no longer without their Burgess, but rose up wholly, and retired to the Upper House, where the whole case was declared by the mouth of the Speaker, before Sir Thomas Audley, knight, then Lord Chancellour of England, and all the Lords and Judges there assembled; who, judging the contempt to be very great, referred the punishment thereof to the order of the Commons House.

"They, returning to their places again, upon new debate of the cause, took order, that their Serjeant should eftsoon repair to the Sheriffs of London, and require delivery of the said Burgess, without any writ or warrant had for the same, but only as afore. Albeit the Lord Chancellour offered there to grant a writ, which they of the Commons House refused, being of a clear opinion that all commandments, and other acts proceeding from the Neather House, were to be done and executed by their serjeant without writ, only by shew of his mace, which was his warrant. But before the serjeant's return into London, the Sheriffs having intelligence how haynously the matter was taken, became somewhat more milde, so as upon the said second demand they delivered the prisoner without any denyal. But the serjeant having then further in commandmont from those of the Neather House charged the said Sheriffs to appear personally on the morrow, by eight of the clock, before the Speaker of the Neather House, and to bring thither the Clerks of the Counter, and such other of their officers as were parties to the said affray, and in like manner to take into custody the said White, which wittingly procured the said arrest, in contempt of the privilege of parliament. Which commandment being done by the said serjeant accordingly, on the morrow the two sheriffs, with one of the clerks of the Counter (which was the chief occasion of the said affray) together with the said White, appeared in the Commons House; where the Speaker charging them with their contempt and misdemeanour aforesaid, they were compelled to make immediate answer, without being admitted to any counsel; albeit Sir R. Cholmley, then Recorder of London, and other the counsel of the City then present, offered to speak in the cause, which were all put to silence, and none suffered to speak but the parties themselves; whereupon in the conclusion, the said Sheriffs and the same White were committed unto the Tower of London, and the said clerk (which was the occasion of the fray) to a place there called Little Ease, and the officers of London which did the arrest, called Bayley, with four officers more, to Newgate, where they continued from the 28th until the 30th of March; and then they were delivered, not without humble suit made by the Mayor of London, and other their friends. And forasmuch as the said Ferrers being in execution upon a condemnation of debt, and set at large by privilege of parliament, was not by law to be brought again into execution, and so the party without remedy for his debt, as well against him as his principal debtor, after long debate of the same by the space of nine or ten days together, at last they resolved upon an act of parliament to be made, and to revive the execution of the said debt against the said Welden, which was principal debtor, and to discharge the said Ferrers.

"But before this came to pass, the Commons House was divided

upon the question: but in conclusion the act passed for the said Ferrers, who won by fourteen voyces. The King, being then advertised of all his proceedings, called before him immediately the Lord Chancellour of England, and his Judges, with the Speaker of the Parliament, and other the gravest persons of the Neather House, to whom he declared his opinion to this effect:—'First commending their wisdome in maintaining the privileges of the House, (which he would not have to be infringed in any point) alledged that he, being head of the parliament, and attending in his own person upon the business thereof, ought in reason to have priviledge for him, and all his servants attending there upon him. So that if the said Ferrers had been no burgess, but only his servant, that in respect thereof he was to have the priviledge, as well as any other. For I understand, quoth he, that you, not only for your own persons, but also for your necessary servants, even to your cooks and horsekeepers, enjoy the said priviledge, insomuch as my Lord (*n*) Chancellour here present hath informed us, that he being Speaker of the Parliament, the cooke of the Temple was arrested in London, and in execution upon a statute of the staple. And forasmuch as the said cooke during the parliament served the speaker in that office, he was taken out of the execution by the priviledge of the Parliament. And further, we be informed by our Judges, that we at no time stand so highly in our estate royal, as in the time of parliament; wherein we as Head, and you as Members, are conjoined and knit together into one body politick, so as whatsoever offence or injury (during that time) is offered to the meanest Member of the House, is to be judged as done against our person, and the whole Court of Parliament; which prerogative of the Court is so great, (as our learned counsel informeth us) as all acts and processes coming out of any other inferior courts must, for the time, cease and give place to the highest. And, touching the party, it was a great presumption in him, knowing our servant to be one of this House, and being warned thereof before, would nevertheless prosecute this matter out of time, and therefore well worthy to have lost his debt, which I would not wish, and therefore do commend your equity, that, having lost the same by law, have restored him to the same against him who was the debtor; and this may be a good example to others not to attempt any thing against the privilege of this Court, but to take the time better."

"Whereupon Sir Edward Montague, then Lord Chief Justice, very gravely declared his opinion, confirming by divers reasons all

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(*n*) The Lord Chancellor was Baron Audley de Walden. He had been Speaker of the House of Commons in 1529; and was the immediate successor to Sir Thomas More, in both the offices of Speaker and Chancellor, F. H.

that the King had said, which was assented unto by all the residue, none speaking to the contrary.'"

Mr. Hargrave has entered the following case in the copy of the printed argument of Benyon *v.* Evelyn, which was in his own library.

"Translation of manuscript report in law French, in my possession, of the case of the Earl of Peterborough against W. M. Williams, Esq. in B. R. Hil. 2 & 3 Jac. 2.

The Earl of Peterborough *v.* William Williams, counsellor. Action *de scandalis magnatum* for publishing a false and scandalous libel, namely, Dangerfield's narrative. Defendant pleads "*aylors*" *quasi* to the *jurisdiction* of the Court, that he was Speaker to the Commons in parliament, and that the Commons ordered it to be printed, and traversed that he is guilty *alio modo*, and that he should be censured for it in parliament, and not elsewhere. And this was adjudged a vain plea. And he pleads the same plea in bar, upon which there is a demurrer. And this term the counsel of the defendant do not insist upon the plea, but that the declaration is ill, because in the libel there is no reproach to the plaintiff, unless that Dangerfield came to him and the plaintiff, encouraged him to go to the Duke of York to discover a plot against the government; and also because it is not averred in fact that the matter of the libel is false, wherefore *curia advisare vult*.

M.

(P. 336.)

In Mr. Hargrave's edition of this case, the passage from D'Ewe's Journal, p. 482, &c. is printed at length, which, on consideration, it has appeared proper to omit, as the book is not rare.

N.

(P. 431.)

The principles stated by Sir Orlando Bridgman in the text cannot fail to have weight in the discussions occasioned by the separation of the United States of North America from the Crown of England; which have been reasoned upon somewhat narrow grounds. That Revolution seems to have made in some degree a new case of alienage; *viz.* that of a people *born* under the ligeance of the King becoming aliens by virtue of a settlement under their own successful resistance to the improper exercise of power.

That such an event should produce any other relations than those of absolute alienage between the two states which so separate, is not easily to be admitted. Yet it has been argued that the treaty of peace of the 3rd of Sept. 1783, did not absolve the citizens of the United States from their allegiance; nor *disqualify them from inheriting lands* within the British empire.

The grounds for this opinion seem to be as follows:—It is a resolution in Calvin's case, 7 Co. 27. a. "That all persons *born* under one natural obedience, while the realms (of England and Scotland) were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization due and vested by birthright cannot by any separation of the crowns afterwards be taken away." The book illustrates this position by a passage from Bracton, fol. 427., shewing that in this case of the separation of the crowns the subject would be *ad fidem utriusque regis*. The examples there are of lands held in England by a Norman after the King of France had seised Normandy, and of lands held in the latter country by an Englishman after the same event. In each case the lands would continue to be held by the previous owners, who thus would owe a double allegiance. The *birth* right and duty by *birth* could not be divested.

The definition also of an alien by Littleton, sect. 198, is, he "who is *born* out of the ligeance of our king;" and in the commentary to this section the *etymology* of the word is noticed, and "*birth* in a strange country under the obedience of a strange prince or country seems to be considered there as the distinctive characteristic of alienage."

A few additional authorities and arguments may be produced to confirm the views thus taken of the subject in an essay printed in the

second volume of the "opinions of eminent lawyers on points concerning the colonies, &c." p. 367, which justifies the American claims.

The supreme court of judicature of the United States has indeed decided, by the same *supposed* principles of pleading, which Mr. Reeves, the author of the argument referred to relies upon, that *one born in Great Britain* before the separation of the two countries cannot inherit lands in the United States; but this tribunal has intimated an opinion that a person *born in America* before such time is not under similar incapacities, with respect to land in England. In the case of Dawson *v.* Godfrey, 4 Cranch 321, the doctrine is thus expressed: "We have no doubt that the correct doctrine of the English law is, that the right to inherit depends upon the existing state of allegiance *at the time of the descent cast.* And that the idea that it depends upon community of allegiance at the time of birth is a consequence that follows from the doctrine that a man can never put off his allegiance, or be deprived of the benefits of it, but for a crime. Community of allegiance once existing must, upon these principles, exist ever after. *Hence* it is that the *antenati* of America may continue to inherit in Great Britain, because we once owed allegiance to that crown. But the same reason does not extend to the *antenati* of Great Britain, because they never owed allegiance to our government. This idea will be best elucidated in the following manner."—

"If an action be commenced in England by an *antenatus* of America for the recovery of land, the plea of *alien born* could not be maintained, because inconsistent with the fact; nor would a plea of the severance of these states avail the defendant, because the act of his government, independent of any crime of his own, does not deprive the plaintiff of his own civil rights, although it may release him from the obligation of allegiance. But if a suit of the same kind is instituted here by an *antenatus* of Great Britain, the plea of an alien born could be maintained, for the plaintiff never owed allegiance to our government. To avoid it he would be put to a special replication, by which he must of necessity acknowledge the truth of the plea, and set forth circumstances which would amount to a recognition of his never having been a party in our social compact."

The point, undecided both in the American and in our Courts, was reserved in a cause of Doe d. Thomas *v.* Acklom, tried on the northern circuit in the last autumn; which now (May 1823,) stands for argument in the King's Bench.

It is difficult to admit that the alleged force of the practice of pleading can determine this question; which seems to depend rather on the non-allegiance of the claimant, when his right is asserted to accrue, than upon the place and condition of his birth. The common course of pleading, which contains an averment with respect to birth, may

have been established upon mere circumstances, and not upon an opinion of such averment being *essential;* for it is said that the plea of alienage is "an odious" defence; and, therefore, "*every thing* should be stated that can oust the plaintiff of his right of suing." Casseres against Bell, 8 T. R. 167. So that the averment may have been added in order to strengthen the cases; and for many years before 1776, the alien parties to suits were actually "*born*" aliens. The narrowness of Littleton's definition, s. 198, may perhaps be justly attributable to the same reasons. Lord Coke's definition also from *etymology* may not improperly be considered an example of an excess of weight having been rested upon that species of argument. The substance of the disability seems beyond question to be, *the allegiance due to another country*, which forms a prominent allegation in all the books. The Court in the case of Derrier *v.* Arnaud, 4 Mod. 405., goes so far as to hold an averment of *birth* out of allegiance not necessary; it is there declared (1695) that "in a real action the word alienigena would have been well enough." Therefore if a person born before the separation of the two countries, or the child or grandchild of such person, being respectively citizens of the United States of North America, should claim lands in England, it may be found to be sufficient to allege that the party is an "alien." The substantial foundation upon which to repel the claim would be that he is out of the King's allegiance; the place of birth would not be mentioned, and no contradiction could arise on the pleading; so that the argument from that topic fails.

It is stated in a volume of reports of cases adjudged in the Supreme Court of the United States, that a decision has been made in Scotland contrary to the foregoing remarks.

"Alexander Brown, born in Virginia, where he always lived, and where he died on or about the year 1802, was the eldest brother in the elder line, of a numerous family, some of whom always lived in Scotland. By the death of a collateral relation in Scotland since his death, the descent of a landed estate was cast; and the question arose whether the eldest son of Alexander Brown, born since the year 1784, or his sisters born before the treaty of peace, or the eldest son of William Brown, the second brother, born before the treaty of peace in Virginia, where he always had lived, or the relations of the intestate in Scotland, who always lived there, and were real British subjects, or any of them, inherited the estate.

"Upon a contestation of these rights it was determined in the Court of competent jurisdiction in Scotland, that the estate descended to the eldest son of Alexander Brown, under the statute of Anne, and the treaty of 1794. The cause was carried by appeal to the Superior Court, who affirmed the sentence in his favour. By his guardian the

young man is now in receipt of the annual income. This decision was made about two years ago. February 4, 1808." 4 Cranch 210, note (*a*), 2d Edit.

This very point, however, of *pleading* was discussed in the analogous case of Sparenburgh *v.* Bannatyne, 1 Bos. and Pull. 167. and it is thus noticed by the Judges:—Eyre, C. J.—"I go a great way with the defendant's counsel, who have argued that at this day the form of the plea of alien enemy, which states the party to be *alien enemy born*, is not absolutely necessary to be adhered to in exclusion of every other case of enmity. In the course of the argument we have had many reasons and authorities adduced to shew, that if a man is really to be considered as alien enemy, though not a native of the country at war, he is so to be considered as to *all the consequences* which apply to alien enemy by birth."

Mr. Justice Heath says, "I will first consider whether, in a plea of alien enemy, it is necessary to state that the plaintiff is alien enemy by birth. The forms of pleading have always been considered as strong evidence of the law, and it is said that they all aver that the party was *born* in the country at war with us. But I observe that in 4 Mod. 405. where the plea was '*alienigena in regio Franciæ sub ligeantiæ adversarii domini regis, &c. oriundus*,' exception was taken on demurrer that it ought to have been *natus;* and some precedents being cited out of Rastall, where the word *natus* was supplied by *oriundus*, the plea was held good."—The argument of counsel referred to by the Chief Justice seems to be as follows:—"notwithstanding the language of the entries, there is no ground afforded by any of the text writers for supposing that the disability of an alien depends upon his birth. In Co. Litt. 129. b. an alien enemy is spoken of as "a *subject* to one that is an enemy to the King," not as a *native* of the country at war. Nor in the following books, Theloall's Digest, l. 1. c. 4. 1 Bl. Com. 372; Terms dela Ley 36; Fost. C. L. 185; H. P. C. 164., which treat of alien enemy, is any mention made of birth. The circumstance of birth is no farther material than as it is one of the cases which constitute alien enemy: and even that is not decisive; for Lord Holt says that a "person may be born in a country at enmity with us, and yet *infra ligeantiam Angliæ;* and he instances the attendants of an ambassador, Comb. 212."

It may, therefore, be concluded that according to the existing law, birth is not of the essence of the character of the subjects of Great Britain—that the independence of any part of the empire, or its absolute separation from the crown, destroys the necessity of allegiance; and that wherever allegiance has absolutely ceased, all the previous relative duties, and all the previous relative rights of individuals as subjects or citizens, have also ceased.

The foregoing case must undoubtedly depend upon established legal principles; but it may be admitted that what are stated in the text to be the foundations of the law on this subject have long lost their supposed original force; and it may well deserve consideration whether, as far as respects the citizens of the United States at least, an alteration of the law of alienage will not be wise. To multiply the motives to amity between all nations cannot be impolitic; and the law itself now looks favourably upon the Americans. Being sprung from an English stock, they are, when naturalized, restored to a more beneficial condition than other aliens. It may therefore well deserve consideration, whether—to use the language of a parliamentary document already cited in these notes—a relaxation of a rigorous code would not "greatly tend to facilitate commercial intercourse, and by so doing *to consolidate a lasting friendship between the two great nations of the world the most assimilated by their language, their laws, religion, customs and manners.*" (*a*)

(*a*) Report from the select committee of the House of Commons on weights and measures, 1821.

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action of debt for arrears of rent reserved in a lease of lands granted by the naturalized son of an alien, made denizen by letters patent, will lie in favour of that son's heir, being his younger brother, born in England after the denization of their common parent; and this although the eldest son was naturalized after the death of the father, and after his younger brother was heir to the father, 454.

where the first son of a denizen is an *alien*, and the second son takes the father's lands as heir, and the first son is then naturalized with the relative words, "*from henceforth and hereafter*, &c." this shall not divest the estate vested in the younger brother; such words give the *future* benefit of heirship, not for the time past, 457.

the incapacity of an alien is not properly termed a disability, but a non-ability, 419.

the law and statutes made in the behalf of aliens, especially of foreign extraction, are tobe taken strictly, 435.

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by the attainder of a tenant in tail, the forfeited estate raised out of the tenancy in tail is a qualified fee simple, 199.
if there be an attainder, and an office found that the person attainted was seised in fee, though this be false, he that had right cannot enter upon the King, or upon his patentee, 218.
by the *attainder* of a *tenant in tail*, the forfeited estate raised out of the tenancy in tail, is a qualified fee simple, 199.

B.

BARON AND FEME.
Where a wife leaves her husband against his will, he is not liable for goods sold to her, although they may be suitable to his degree, and although he did not allow her maintenance: and she did desire, before she bought the goods, to return to his house. Before the sale and delivery of the wares, the husband did forbid the plaintiffs to trust his wife, 229.
it is a seasonable supposition that the wife, who is allowed to be housekeeper, and to manage the affairs of the house, hath also a *general authority* to buy necessaries for the family and for herself: and if she borrow money, and bestow it upon necessary apparel, the husband must repay it, 248.
a wife is incapable, in the eye of the law, to make a contract; and, therefore, cannot by contract charge her husband without his consent precedent or subsequent, 230.
it is clearly against law, that the wife, whatever may be her necessity, should impawn her husband's goods, or take money without his consent, to lay out for necessaries, 257.
the contract of a feme covert cannot bind her husband, unless she have an authority precedent, or an assent subsequent, 249.
the wife cannot contract against the husband's will, because she cannot retain against his will what she contracts for, 233.
when it appears in evidence that the wife hath left her husband and family against his will, and then takes up wares, the presumption of an authority in fact ceaseth, 253.
if an action be brought against the husband for goods taken up by the wife for the family, it is in itself *primâ facie* a good evidence against the husband of an authority in fact given to the wife, that they came to the use of the husband, if nothing be proved to the contrary; as that his *steward* usually provided all things for the family, or that the wife was *forbidden* to take up the goods, or the mercer to deliver them, 252.
in an action against J.S. upon a contract by his wife or servant, for wares, &c. if it be given in evidence that the wife or servant bought the like before upon trust, and J.S. hath paid for it, it is a presumptive evidence J.S. gave authority to this contract also, 252.

BARON AND FEME—*continued.*
if a mercer once charge the husband and wife in trover and conversion for wares delivered to the wife without the husband's consent, and again deliver to her wares without such consent, he shall bring another action of trover and conversion against the husband, because the second delivery will be an evidence of fraud and combination between the mercer and the wife to charge the husband, whom the mercer knew not to be consenting, 263.
if the wife has been in fault, and desire to return to her husband, she may be required to swear to obey the injunction of the church. If the husband refuse to receive his penitent wife, without satisfaction, she may apply to the bishop, as the common parent, and offer it; which, when accepted, will restore her to her right unblemished, 246.
if the wife give satisfaction of her penitence, although not of her innocence, and her husband will not absolve her, the law will restore her; though not absolutely, yet so far as that she may have such a maintenance as the condition of a penitent person requires, 246.
if a wife desire a separation on account of cruel treatment, she may be allowed alimony; and yet, if the Ecclesiastical Court think fit, be tied to live with her husband, he giving caution to treat her well, 239.
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it is an error that there must be of necessity a separation upon complaint by a wife of the cruelty of her husband—and it is a mistake that alimony cannot be demanded in *causâ principali*, 239.
if a wife be beaten or slandered, she cannot, by law, compel the husband to bring his action, 232.
if a husband join with rebels, his wife may leave him, 243.
although the husband allow no maintenance for his wife, she cannot take up his wares; and by way of contract charge the husband, without his appointment or direction precedent, or consent subsequent, 230.
several moieties may be of an estate tail, as well as of a fee simple between baron and feme, 559.
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the courts at Westminster will judge if the by-laws made in the City are beneficial to the public, and therefore good, 280.
if a by-law be made that upon doing or omitting such an act, the party should be imprisoned, it is naught. For it is the end of the suit; the party hath no remedy to free himself from it, and therefore it cannot be done by a by-law. Where the by-law is a money mulct, for which debt will lie, and imprisonment on nonpayment, it is good, because the party may help himself if he will, by paying the money, or putting in bail, 276.

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an act or thing may, by construction of law, be void to all purposes as if it had never been, so that all persons may take advantage of it. It may be void as to some persons, or to some purpose only. It may so be void as that he for whose benefit it is to have it made void, may, if he will, make it good; and, if he do so, it shall be good as against him, and all other persons; and in the mean time it is void in construction of law as against all persons, 480.
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who dies before admittance, had, in a strict sense, no right to the tenement; but he had a *scintilla juris*, a right, in the larger sense, upon a contingency, *i. e.* if the presentment be made, he had a right to compel the lord by a suit in Chancery to admit him; which right descends to his heir, 25.
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the lord hath only power to make admittance according to the form and effect of a surrender, 33.
if upon a surrender of copyholds the lord admit a wrong person, he may after admit the right person; and till such admittance of the right person, the surrenderor hath the estate, 33.
he who is entitled to a copyhold is a mere stranger as to any possession, or possessory action, till admittance, 33.
the surrender of a copyhold binds the land and estate and interest; so that, if it be presented at the next Court, all mesne acts will be void by relation, after admittance, as against the surrenderee, or his heirs, 24.
if copyholder for life have a licence to lease for twenty-one years, if he so long live, and lease for twenty-one years absolute, it is good, 205.
the surrender of a copyhold binds the land and estate and interest; so that,

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if it be presented at the next Court, all mesne acts will be void by relation, after admittance, as against the surrenderee, or his heirs, 24.
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a recital declares the meaning of the King, and is always the best direction for the construction of his grant, 196.
in grants of the King, the words *ex certa scientia, mero motu, et gratia speciali*, are words of course, and do not take away the presumption of law, that the fact alleged in the patent shall be taken for the suggestion of the party, 193.
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where separate estates in fee simple, qualified and absolute, are in the King, with other intervening estates of the same lands in other persons, *general words in the* habendum *of the King's grant* of the lands, being sufficient to extend to all the separate estates, but implying one entire *continuing* estate, cannot pass all these separate estates, 181.
where the King intended to pass one estate, and the patent in effect passeth more than one, the King is deceived, and the patent is void: and when, instead of one entire continuing estate, several estates in fractions are created by a patent, that patent is void, 181.
if the King having but for twenty years grant for forty years it is void. If the King granted for one thousand years, or such other long term as would be a mortmain, it is a void grant, 206.
the King's grant shall be taken in the usual and common sense, *secundum intentionem regis;* and not *in deceptionem regis*, 208.
the grants which the King makes, he makes as King, and as King he ought to be informed, that his purpose may take effect; or otherwise as King he shall avoid them, 193.
it is not necessary for the King to recite how an estate comes to him by attainder or otherwise; nor what estate a person attainted had, 195.
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the King cannot have two estates in fee together, where they are immediate, and no other estate between them, 200.
some false considerations, and some false suggestions, shall avoid the King's patent, and some not, 189.
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the custom against foreign buying and foreign selling is reasonable, 291.
the old customs and franchises of the city of London may by their ordinances be applied to new courts consisting of members of their corporation. If new companies be made in London, the regulation of them comes within the compass of the liberties, customs, and franchises, of the city, 297.
it is an ancient custom in the city of London to restrain common brokers or factors from exercising that trade or faculty without approbation; and also to take sureties of them by recognizance, 296.
London is a county palatine, and the Judges take notice of their customs and laws, 277.
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to supply defective former customs, or putting new remedies where required, is good, 278.
a custom confirmed by act of parliament distinguished from a power by charter, or a custom in general, to make by-laws, 278.
a custom as to descents of copyholds, may be so laid that the youngest son, or brother of the purchaser, though not admitted, may inherit, 25.
if a custom were laid, that all the customary land within a manor is of borough English, or gavel-kind, and shall descend to the youngest, or all the sons, the heir in borough English, or gavel-kind, should inherit, although the ancestor had not been admitted, 25.
if a particular custom is set forth, whereof the law takes no further notice *than as it is alleged*, there the custom shall be taken strictly as alleged, and no further, 26.

D.

DEAN AND CHAPTER.
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yet a Dean cannot demand a rent due to the Dean and Chapter, 148.

DEED.
the legal intention is to be taken only from the words of a deed, 542.
construction ought not to be against the letter of a deed; yet in some cases a strained and secondary interpretation may be admitted to avoid absurdity, where the plain intention of the parties in the other parts of the deed is to have it so; otherwise, where the intention of the party is not clear, but in *equilibrio* as it were, 169.
the intention of the party is the guide and rule in deeds as well as in wills: but it must be first manifest, not merely conjectural. Secondly, It must be, not a foreign or collateral intention, but drawn out of the body of the deed itself; and, thirdly, it must not be contrary to the letter; for that were not *interpretari, sed condere*, 158.
whilst the words of a deed are such as may be subservient, or not contrary to what they may be extended; otherwise when they are express and positive. If Judges at common law begin to recede from the letter of deeds to equitable constructions, upon foreign conjectures and intendments, they will make uncertainty and confusion in the law, 543.
this hath been done too much of late times, 543.
every one is presumed to grant that which he may lawfully grant, 344.
it is a good rule that where an estate for years is limited, or future interest, and when it should begin there is none to take it, that it shall be void, 371.
in deeds, *quod generaliter dictum, generaliter est intelligendum*, 108.
the misrecital of the date of a deed may be essential—if by it the estate be changed from what it should be by the intent of the deed appearing in itself, then the misrecital is essential, 535.
let the reference be never so strict in the words, yet if the variance be immaterial, or if there be certainty sufficient in it to satisfy the Court that it is the same thing which was intended, the variance shall not hurt. But otherwise it is where it does not appear that the instrument referring, and that to which it refers, are not the same, 537.
the change of the date of a deed is material to the deed itself: but yet the misrecital of it may not be material within the instrument referring to it, nor as to the estate created by it, 536.
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tion of grants in like cases at the common law, unless the intent of the testator appear in the will itself that it should be otherwise, 387.
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an executory devise good, although subject to a double uncertainty, 399.
Semble, that where a testator implies in his will an intention to buy lands, and the general words of the devise comprise them, those lands shall pass, although bought after the making of the will, 560.
that I. S., a mere stranger, or his heirs, shall sell land; it is mere power; the feoffment or release of I. S. or the minority of the heir, shall not hinder the sale, 111.
to J. S. and his heir, or to J. S. and the heir male of his body in the singular number, is an estate of inheritance, 43.
of a term to A. for life, remainder to B., is not good as a remainder, but it is good as an executory devise of the possibility to B., 377.
by A. to his widow "to dispose at her pleasure, and to give it one of her sons, which she pleaseth." If this be a power, the subsequent coverture of the widow does not disable it; and if a condition, it is a condition depending on the power to alien; and in neither case is the coverture by law an impediment, 110.
of land for so many years as one shall live is void, as a devise of a chattel, 39.
devisee in possession of lands without entry or claim; to some purposes, 495.
Dictum recognized, that a devisor may make his own heir take by purchase, by a plain declaration in the will, 413.
of lands to A. and B. and their heirs; A. dies without issue before the testator, who does not republish his will after the death of A.; B. takes the whole of the lands in fee simple, 384.

DISCLAIMER.
disclaimer by parol *in pais* and upon record distinguished, 492.

DISSEISIN.
A. and B. are lessees of land for eighty-one years, if C. so long live, the term to commence *in futuro*, and from and after the day of the death of C., for thirty-one years, from thenceforth. A. and B. enter before the commencement of the term of eighty-one years, which is a disseisin, and suspends the right of assigning the *interesse termini*: but being put out of possession by their lessor before the thirty-one years had begun, their disseisin is purged, and that future interest is not disturbed, so that their assignment of it by indenture is good. A lessor disseised, who had no right to the perception of profits if no disseisin had been, yet may enter to purge the disseisin. *A fortiore*, where he that had but the future interest disseiseth lessors, they may enter to recontinue their right, although the term for the commencement of the future term were incurred, 16.
if a stranger disseise such disseisor, this would not revest the estate, 16.
if he that hath rent out of land or a seignory disseise the terre-tenant, his seignory or rent is suspended, but not turned to a right. As soon as the disseisin is taken away, he is restored to the rent, &c. 14.
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if disseisor would waive his possession, the disseisee may waive it, because he

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by one who hath a future term of years in the land hinders him to grant over his term, 14.
where the entry of disseisee is congeable upon the disseisor, the tortious fee will be turned into a rightful particular estate, if the right of the freehold comes any way by act in law to the disseisor, though for a less estate. Under a disseisin to the use of a feme she takes nothing till agreement: but if an estate be to her or to her use, it is in her till the husband disagree, 117.
a disseisor upon a disseisor shall be liable to his charges as long as the disseisin is in force, 16.
feoffor in trust is not by his entry like another trespasser. He is not a disseisor unless he occupy expressly against the consent of the feoffee, 488.
where a husband was *actually* seised in fee simple qualified under a grant of the Crown, with remainder to strangers in tail, remainder to the husband and his heirs for another qualified fee simple estate; and dying so seised, the first fee determines, and the strangers enter, and that remainder to them being spent, the heir of the husband enters in respect of the second qualified fee, query, if the widow shall be endowed; the estate whereof her husband was *actually* seised being determined, 208.

E.

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if tenant *pur auter vie* bargain and sell land for years, the bargainee hath the possession before entry or claim: but to some purposes it is a possession in law only, 495.
at the decease of a tenant at will, who is also tenant *pur auter vie*, he who is to take the estate by act of law will be prior in time to him who is to take by entry. The act of law takes effect *instanter*; the entry will leave an interval of time necessarily, 499.
where lands given to or to the use of the husband and wife (before marriage) in special tail, the fine or feoffment of the husband is no discontinuance of the entail for more than half of the land so settled, 559.
ENTAILS.
where there is a bar to the entail, there is no remitter to the reversion by the statute 32 H. 8., 8.
ESTATE.
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EVIDENCE.
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upon a recognizance, or judgment, if either the plaintiff or defendant die before the writ of *execution*, there must be a *scire facias*.
writ of elegit was sued out upon a judgment obtained by *scire facias* against the conusee of a recognizance; and the conusee died before execution, yet the execution was good. As the statute creating the elegit has not made any provision concerning the abatement of it by the death of the defendant, it ought to be construed as other process of execution; which doth not abate by death, where the defendant hath no day in Court, 464.
the clause in the writ of elegit commanding the extent to be upon warning of the defendant, and in his presence, is but a recommendation to the sheriff, not a precept to make the writ void if disobeyed, 464.
if the execution had not been well made by reason of the decease of the defendant, it is absolutely void, not voidable only, 464.
where T. C., seised of certain lands in fee, acknowledged a Statute Staple to A. and H.; and the conusees, after his decease, sue out an extent on the statute during the minority of his heir; and in the writ of *extendi facias*, there are these words,—*nisi alicui hæredi infra ætatem existenti jure hæreditario descenderunt*, the execution of this extent being had *during the minority of the heir*, is absolutely void, although the heir consented to it,—and not voidable only, 475.
in process of execution, though the sheriff do not all that is commanded him, if he have warrant to do what he doth, it is sufficient for the party, 472.
upon a judgment in ejectment, if the defendant die after the writ of possession taken out, yet the execution may be made by the sheriffs, 468.
executions are to be favoured, 468.
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shall not be charged in debt for default of the testator in the performance of a contract in law, 228.
an executor may bring an action of debt for not setting out tithes in the life of the testator, 227.
an executor may bring an action on the case, on a promise in law to pay money, 225.
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if the sheriff extend the lands of an heir within age, it is void, 472.
if after a judgment of statute acknowledged, under the statutes of West. 2. c. 5. 13 E. 1. and 27 E. 3. the conusor sells the land, and the extent is laid upon the purchaser, who interrupts the conusee, he shall hold over.
And so it is, if after the land is extended in the conusor's possession, he conveys away the land, and the grantee or feoffee enters on the conusee, he shall hold over, 511.
EXTINGUISHMENT.
if tenant for life be disseised, and release to the disseisor, it is a question whether the estate for life be not so extinguished that the reversioner may enter, notwithstanding Lord Coke's opinion, Co. Litt. 276. a., 498.

F.

FACTORS.

factory is itself no trade, 313.

if one of two joint partners, being foreigners, buy cloths on the partnership account, and sends them to the other in London, he may sell them in Blackwell hall without being an admitted factor, 293.

the same office which is now borne by persons called factors, was anciently borne by those called brokers, 296.

the law doth not allow a fee upon a fee, but *for mere necessity, where it cannot be otherwise*, 42.

FINE,

when tenant in tail joins in levying a fine, the old use of the entail cannot result, 556.

the declaration of the use of a fine follows the ownership of the lands, 554.

the fine levied by the uncle of an idiot hinders not the son of the uncle to inherit the idiot, 439.

lease for years to begin presently, and lessor continues in possession, fine by lessor with non-claim shall bar the lessee, 13.

two joint tenants levy a fine; the declaration of the use by one of them affects one moiety only of the lands, 553.

a tenant for life, remainder, or reversion to B. in fee levy a fine; declaration of the use by B. does not bar the estate for life in A., 554.

if tenant in tail, *remainder* to him in fee, levy a fine, a fee passeth. The fee is raised out of the estate tail, 555.

A. being tenant for life of one moiety of lands, remainder to B. and his wife in tail, with reversion to A. in fee; and B. and his wife, tenants in tail in possession, with reversion to A. in fee of the other moiety. The fine of A. and B. good against A. although B. alone declared the uses of the fine, 553.

conveyance to the use of H. M. and his heirs, until he fail in paying so much money, and after to P. V.—H. M. failing in payment, becomes tenant at sufferance; he makes a lease for five years, and a release upon it; and the relessee enters; this turns the interest of P. V. to a right; a fine then levied of the lands by H. M. to the relessee, and non-claim for five years bars that right, 547.

where A. is tenant for life of a moiety of lands, with remainder to B. in tail; and B. is tenant in tail in possession of the other moiety, with reversion in the whole to A. in fee;—the *fine* of A. and B. as to both moieties, will enure to *uses declared* by B. alone, to himself in fee. For as to the first moiety, the fine destroyed the reversion; and as to the second moiety, it worked a discontinuance, 547.

lease is to commence at a future day, and lessor is disseised; fine by disseisor after that day, before the future interest has come into possession and non-claim within five years, shall bar the lessee, 13.

in such case fine by reversioner after that day with non-claim shall bar the lessee, 13.

the estate which passes from a tenant in tail to the conusee in levying a fine is a fee, and he cannot grant the estate tail; therefore, if the use must result according to the estate granted, it must be a fee also, 556.

H.

HABEAS CORPUS.

upon a writ of *habeas corpus* of privilege, and only to shew cause why the party should not enjoy his privilege in the Common Pleas, that being

HABEAS CORPUS—continued.
satisfied, the Court may at their discretion remand the prisoner, and not meddle with the other causes returned upon him. When the cause is returned upon a *habeas corpus* of privilege, it shall not be taken strictly as other pleadings are, but the return may be supplied and supported by evidence of fact, record, custom, or the like, 284.
where a writ of *habeas corpus* runs "to return the body with the day and cause of the imprisonment," the actual day of the taking is seldom material, so that it be before the serving of the writ, 275.
if it should be conceived to be material, the party may move for an amendment of the return; but it is no cause for discharging the party, 275.
a return upon a *habeas corpus* of privilege need not to be certain, as other pleadings are; and the matter returned may be supplied by other matter in fact, 287.
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a return upon an *habeas corpus* is to be taken less strictly than the pleading of a prescription, 270.

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construction of, 181, &c.

HEIR.
the law will not make construction that a testator intended *contingencies* to disinherit an heir, 55.
the word "heir" is frequently taken for all the heirs collectively as well as a single individual heir after the death of a named tenant for life, 42.

HOLDING OVER,
although limitations by wills or by way of use for some estates to cease, and others to rise up, on non-payment of sums of money, are created by the Statutes of Uses and of Wills, the reason of holding over, when the money is not paid, is grounded on the common law, and not upon any words in either of the statutes concerning uses or wills, 509.
where a limitation is of a chattel estate for a term, where it is certain in the commencement and end, though the lessor or his heir, or he that hath the next estate, enter on the term wrongfully, he shall not hold over, but is put to his remedy for the mesne profits; and this is so, even if the eviction be lawful, by a dowress, or the like, 509.
where a limitation was in a settlement made before marriage of A. to the use of trustees and their heirs until they should raise certain portionary sums of money, if not paid at a fixed time by A.: and the portions were not then paid; and the trustees permitted the assignees of A. to enter and take profits of the lands beyond the amount of the portions; still the trustees may afterwards enter and *hold over* to raise the portions, 509.

INFANT.
it is clear the father is not chargeable at the common law to maintain his children, 257.
in those acts which concern the disposition of an estate or interest, the reason of the law turns, in case of infancy or coverture, upon the point of prejudice, or not prejudice, unto this interest, 117.

INNKEEPER.
an innkeeper is liable to the *administrator* of an intestate for the loss of the intestate's horse, whilst in his care; there is a contract or assumpsit in law between the innkeeper and the guest; the injury suffered is not a tort only, 223.
the law forceth the innkeeper to receive the guest's horse, else an action will lie against him. So as to preserving goods, 227.
if the guest pay not the bill, the innkeeper may detain his horse, or may bring an action for lodging, &c. without any special contract, 227.

J.

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if ecclesiastical or marine matters come before the common law judges, they must take notice of the ecclesiastical or marine laws, 243.
in causes matrimonial and testamentary, a sum certain or goods in specie may be sued for in the ecclesiastical court; but generally not in other cases ecclesiastical, although damages, and sums to be ascertained in the conclusion by the Court, may be there adjudged in other causes, 240.
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a lease for 100 years, to commence ten years after the death of B., is good in interest, and presently assignable, 4.
if lease be made for years to begin at a day to come, and the lessor continue in possession beyond the time of commencement of the lease; yet the lessee may grant the same over, 11.
concurrent leases, 94, 135.
bishops may make concurrent leases, lease upon lease, every year, for twenty years together, so there be none in being at once exceeding twenty-one years, 101.
if a deed be dated the 30th of Feb. and a lease be limited to begin from the date, it shall not be void, but begin from the delivery; for the limitation was impossible, 534.
there needs no reservation of power to lease upon copyholds; the lord may grant them according to the custom, 177.
ecclesiastical leases under the restraining statutes, 7.
ecclesiastical lease to A. for the life of A. and B. and C., he hath but one entire estate, 376.
if lessee of a term, to begin after a former term, leaseth all the lands by indenture, for twenty-one years, to begin presently, this is a good lease by estoppel, between the parties, 545.
if A. by indenture lease lands which are not his, *habendum* from a day to come; this is a good lease by estoppel for that time, 545.
a lease which works partly in interest cannot work at all by estoppel, 544.
if a lease be made to begin at Michaelmas, and before the day a stranger enter, the lessor is disseised; yet the future interest of the lessee is neither divested nor turned to a right. And if the disseisin continue till after Michaelmas, that interest may be granted over, 4.
an indefinite power to lease for lives or years, so as upon every lease to be made in possession the old rent be reserved, and on every lease in reversion, double the old rent be reserved, will justify the granting of leases in reversion, 8.
leases in reversion under indefinite power, when restrained; when not restrained; and how they must take effect, 94.
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the possession of lessee for years is sometimes called the actual possession of the reversioner, though improperly, 495.
if a former lease be misrecited, so as the name of the lessee be mistaken, or the like, the lease which is limited to begin after the lease so misrecited shall begin presently, 541.
tenant in tail may make a lease for twenty-one years, though the reversion be in the Crown, 106.
if A. lease to B. at will, B. is not tenant at will, till entry. If A. lease to B. for twenty-one years, to begin presently, B. is not lessee for years till he enter, 499.

LEASES—*continued.*

lease to A. for twenty-one years to begin at Michaelmas, remainder to I. S. for twenty-one years more, there is a privity between them; and after Michaelmas, it is an estate to A. in possession if he enter, remainder to I. S., 5.

where a lease is misrecited, and a second lease is limited to begin after it, if the misrecital be in a point material, the second lease begins presently: but if the reference be never so strong, yet if the variations be in a point material, it shall begin after the end of the first lease, 534.

where A. hath a lease for the life of himself and two others, B. and C. and grants the land for the life of himself, or for the life of B. or C., this passes the whole estate, and freehold, for the life in question; and there is only a contingency or possibility that it may come back to the grantor, 376.

the reservation of several rents does not make several terms, 7.

lease for twenty-one years to A., and after the expiration of thirty-one years, then to A. for forty years, the latter term is a future interest, 7.

if lands are given to two for their lives, remainder after their deaths to their executors or administrators for forty-one years; if they surrender or otherwise determine their estates for lives, the forty-one years begin presently, 370.

and so it is if they had granted away their term for forty-one years, and after surrendered their estate for lives, the grantee might have entered presently, 370.

if a lease be made to begin at Michaelmas, and before the day a stranger enter, the lessor is disseised; yet the future interest of the lessee is neither divested nor turned to a right. And if the disseisin continue till after Michaelmas, that interest may be granted over, 10.

the statute 32 H. 8. c. 28. gives power to such persons only to lease, who had of themselves no power to make leases before that act, 124.

by the 13 Eliz. c. 10. a Dean and Chapter may lease to A. for twenty-one years; then to B. *the next year*, for twenty-one years, to begin from the making, &c.; and so to C.; and all the leases will stand together, 125.

land given to I. S. for eighty-one years, with remainder over to B. for thirty-one years, the remainder depends on the term for eighty-one years, 5.

not so, if the second term be created by another deed after the term for eighty-one years, 5.

that a lease for years should be totally uncertain, is against the rule of law: but it may be good as a freehold under circumstances, 39.

if a lease *in esse* be in a point material misrecited, in a new lease of the lands (granted to another lessee, *habendum from the end of the former misrecited lease*)—this shall begin from the making of the new lease, as if no such former lease had been; for where a lease is misrecited, there is no such lease as that to which the reference is made, 540.

lessee for years enters, and makes a lease at will, lessee at will enters, and dies, lessee for years hath an actual possession to all purposes, without any other actual entry. The lessor might lease to a stranger without entry upon a tenant at sufferance, 496.

lease to A. for twenty-one years, to begin at Michaelmas, remainder to I. S. for twenty-one years more, there is a privity between them; and after Michaelmas, it is an estate to A. in possession if he enter, remainder to I. S., 5.

land given to I. S. for eighty-one years, with remainder over to B. for thirty-one years, the remainder depends on the term for eighty-one years. Not so, if the second term be created by another deed, after the term for eighty-one years, 5.

a man may make a lease at will, to begin futurely; the lessee may enter at the future time, and be tenant at will, 499.

lease for years to begin presently, and lessor continues in possession, fine by lessor, with nonclaim shall bar the lessee, 13.

LIMITATION.

to have an estate cease and rise again, the proper words are *toties quoties*, 203.

there shall not be a fee upon a fee by limitation of use. By devise, or contingency, or escheat, it may arise, perhaps, in some cases, 557.

resemblance of executory devises and contingent remainders, 400.

limitation to the right heirs of one to whom no estate before limited by the instrument improper, 551.

it is a clear rule in law, where an estate is limited to two, and the one is capable the other not, he that is capable shall take the entirety, 387.

limitation to the heir of an ancestor, where the ancestor does not take before, improper, *i. e. improper if it be meant to make the ancestor a purchaser*, 551.

perhaps a difference is between a limitation of uses on a feoffment, and a covenant to stand seised to uses, 4.

feoffment of lands in London, *habendum* to the feoffee and his heirs, after the death of the feoffor, is a void *habendum* in the whole. But it had been *habendum* to him and his heirs, *this estate to begin after the death of the feoffor*, the latter clause only had been void, 539.

till Shelly's case, it was long debated, whether, when an estate was limited to a man for life, remainder to the heirs males of his body, whether the heir did not take as a purchaser, 58.

grant to J. S. *et primogenito filio.*—If J. S. have then no son, the words are void. So a grant to a man *et hæredi*, if *hæredi* be taken as a word of purchase, not limitation, is void, 42.

if lands be granted to A. for life, remainder to his first son, and the heirs males of his body; and for default of his issue, to B.; it is clear that such issue goes not to the issue of A., but to the issue of his first son; and, therefore, if the first son's issue fail, it shall go to B., and not to the other sons of A., 53.

a void limitation of time for the commencement of a lease is equivalent to no limitation of time at all, 529.

limitations of uses distinguished from devises, 337.

the law makes no difference on a limitation by will, or by way of use, in the expressions "till such a sum *be* paid," and "till such a sum *might be* paid," 508.

perhaps a difference is between a limitation of uses on a feoffment, and a covenant to stand seised to uses, 4.

when the determination of the estate is uncertain, as if land be limited to one till such a debt be raised, and such a sum be paid, and then if the heir or reversioner hinder the raising of the money by taking the profits, he shall not take advantage of his own wrong; it is at the election of the grantee to bring his action or to hold over, 63.

where a moiety of lands were settled "on A. B. *the elder*" for life, with remainder in special tail to "A. B. *the younger*;" and the other moiety was settled on "A. B. *the younger*," in special tail; "and for default of such issue the remainder of the whole premises to the use of the right heirs of *the said* A. B. for ever," without specifying "the elder," or "the younger." This ultimate limitation was held, *under the circumstances*, to be in favour of A. B. *the younger*, 547.

A., being lessee of lands of the chancellor of St. Paul's, for the life of himself, and of his two sons B. and C., grants all his estate therein to trustees to the use of himself for life, and after his decease to the use of Rebecca, his wife, for her life, and after her decease, to the use of his son B., and his heirs, the whole estate of A. is vested in himself by the first limitation; and by the third limitation, a use is executed in B., and his heirs, by way of springing use, 573, &c.

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it hath been usual for the corporation of the City of London to take new grants upon the entrance of every King after his predecessor's death; and the law allows them to be pleaded as *confirmations*, though the words be *damus et concedimus*, 279.
if the City of London grossly abuse their power, a *quo warranto*, or information of that nature, may be brought against them, 281.
the city of London has power over foreigners for matters of trade done within their liberties, 304.
the franchise in the city of making by-laws or orders to apply new sound remedies in new emergencies, is expressly confirmed in parliament, 281.
the rich merchants and traders of London begin to decline the freedom of the city, or to bear public offices, 323.
in the Mayor's Court of the City of London, the use is, that none shall be a *constant* lawyer there but the common pleaders. But every man may, in his *own* cause, have his own counsel, 301.

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non tam attendenda est proprietas verborum quam rerum significatio, 40.
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quod restringendi causa additur in casu Domini Regis, si falsum sit, vitiat chartam, 193.
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in many cases a tortious fee, where there is an accession of a lawful freehold, shall be resolved and melted into it, 6, 10.
a rightful term may be drowned in a tortious fee; but a tortious fee cannot be turned into a term for years, though rightful, 10.
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as to the relation of acts of naturalization, 455.
in order to break any rules of law or descent, by an act of naturalization, it must contain special provisions for that purpose, 462.
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party had no remedy by traverse, or *monstrans de droit.* But if the title of the party were found in the same office, he might then have his *monstrans de droit.* In this case he could not enter on the king; but he might enter on the king's patentee. In all cases where, by the common law, one might have a *monstrans de droit*, or traverse, against the King, he might enter upon his patentee, 218.

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P.

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the ancient usage of parliament, and the law of parliament, are the same thing, 334.

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it is clear that a member of the House of Commons ought not to be arrested at the suit of the party upon mesne process whilst parliament is sitting, 335.

privilege of parliament, as not to be obstructed in the personal performance of parliamentary duty, distinguished from privilege, without the walls of parliament, of the respective members personally, or for their servants, where parliamentary duty is not impeded, 334.

a general *supersedeas* in cases of privileges, to cease all process during the sitting of parliament, is against law, 344.

it is a breach of privilege to distrain a horse, or goods, of a member of parliament, which he hath with him for his use, whilst he attends by command, 350.

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an act of common council must be pleaded entire: but the independent clauses shall not vitiate each other, 315.
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bare authorities are to be taken strictly, 91.
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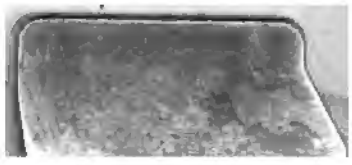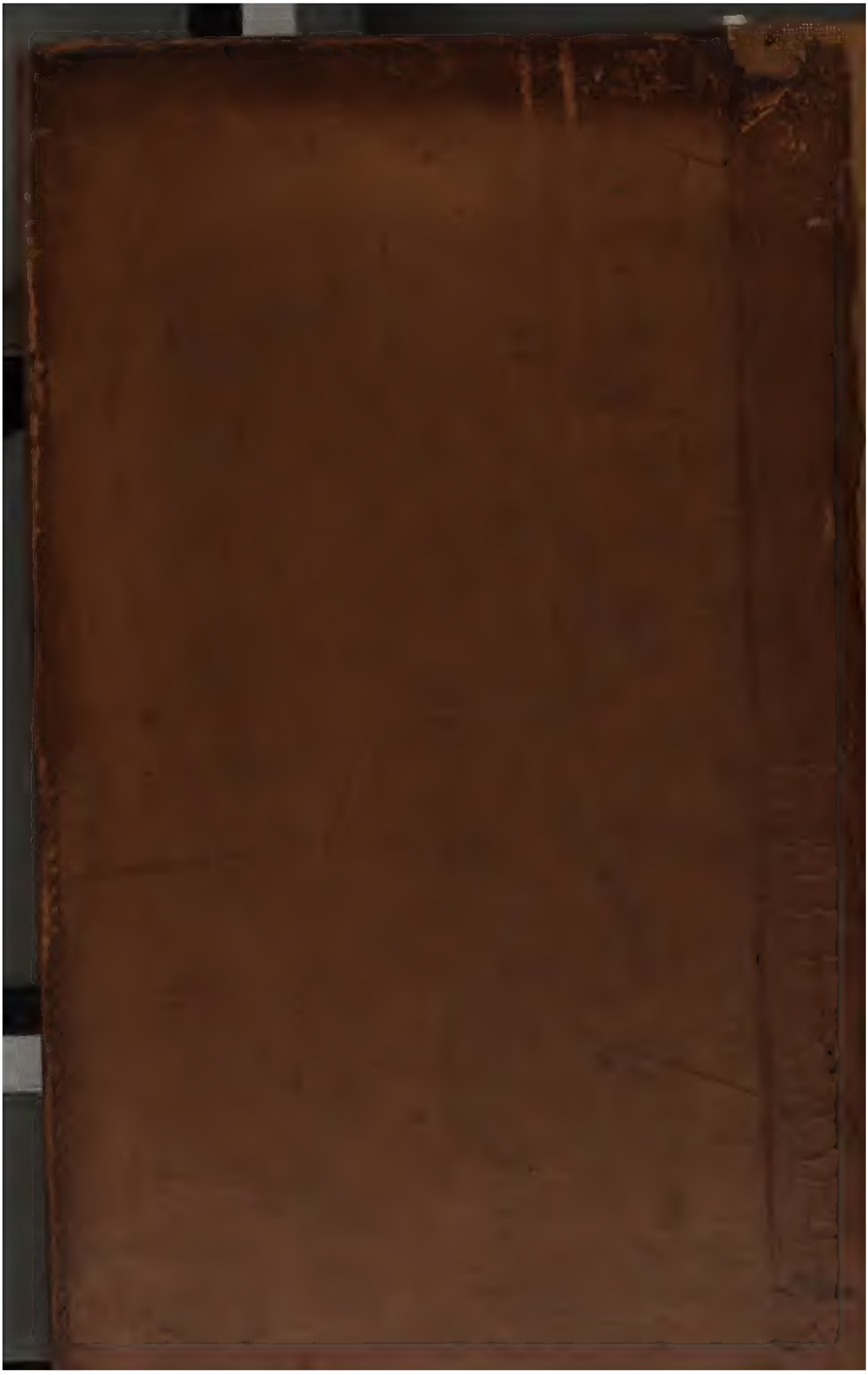
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